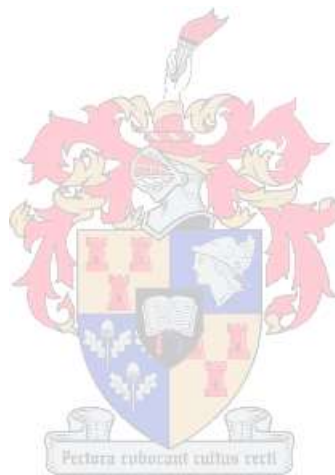


Reconsidering the relationship between property and regulation: A systemic constitutional approach

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Dissertation presented in partial fulfilment of the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Elsabé van der Sijde

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Summary

This dissertation considers whether the approach to the regulation of property in the constitutional context is compatible with either one of the major theoretical approaches in private law, namely that ownership is fundamentally absolute or alternatively that regulatory limitations are inherent to ownership. It finds that the inherent/external debate is of limited value in South Africa's constitutional context because there has been a shift toward a stronger emphasis on reconciling individual entitlements with other (constitutional) interests.

In response to the inadequacy of the existing (private law) approaches, this dissertation proposes a systemic constitutional approach. In terms of this approach, property is regarded as part of an inherently regulated constitutional legal system. Disputes regarding the protection of entitlements must be addressed with reference to the objectives of the system as a whole and regulation is understood as a mechanism through which constitutional values are promoted. Thus, regulation of the use of property does not erode the institution of private property, because the system provides for constitutional or statutory control over the regulatory process.

In this context there is an overlap between sections 25 and 33 of the Constitution, since the secondary regulatory function can be fulfilled by the principles of either constitutional property law or administrative law, when the use of property is regulated through administrative action. The complicating factor is that not all regulatory measures are also administrative actions. The use of property can also be regulated directly through common law or legislation, or through acts of the executive or judiciary. In terms of the systemic constitutional approach, direct application of section 25 should be reserved for cases of direct statutory or common law deprivation. Where more than one regulatory framework is potentially applicable, the subsidiarity principles should identify the appropriate framework, to avoid the creation of parallel systems of law. Ultimately, reconsideration of the relationship between property and regulation is part of an ongoing constitutional conversation which can only take place when we explicitly engage with questions regarding the role, function and status of property and regulation in the constitutional legal system.

Opsomming

Hierdie proefskrif heroorweeg die benadering tot die regulering van eiendom in die grondwetlike konteks om te bepaal of dit strook met die teoretiese benadering in die privaatreë, naamlik dat eiendomsreg fundamenteel absoluut is, of alternatiewelik dat eiendomsreg inherent beperk is. Dit bevind dat die waarde van hierdie intern/ekstern-debat beperk is, aangesien daar in die grondwetlike konteks wegbeweeg word van oormatige klem op individuele regte na versoening tussen individuele regte en ander (grondwetlike) belange.

Omdat beide benaderings tot regulasie in die privaatreë onvoldoende is, stel die proefskrif 'n sistemiese grondwetlike benadering voor. In terme van hierdie benadering word eiendom beskou as deel van 'n inherent-gereguleerde grondwetlike regsisteem. Geskille rondom die beskerming van individuele regte (in eiendom) moet besleg word met verwysing na die oogmerke van die sisteem as geheel en regulering word ingevolge hierdie benadering beskou as 'n meganisme waardeur grondwetlike waardes bevorder word. Daarvolgens bedreig regulasie nie die instelling van privaat eiendom nie, aangesien die sisteem voorsiening maak vir grondwetlike of statutêre beheer oor die regulerings-proses.

Vir doeleindes van hierdie proefskrif is daar in hierdie opsig 'n mate van oorvleueling tussen artikels 25 en 33 van die Grondwet, omdat die sogenaamde sekondêre reguleringsfunksie moontlik deur die beginsels van óf grondwetlike sakereg óf administratiewereg vervul kan word. Problematies is die feit dat die oorvleueling net gedeeltelik is; nie alle regulerende maatreëls is ook administratiewe handeling nie. Die gebruik van eiendom kan ook gereguleer word deur direkte toepassing van wetgewing of die gemenereg of deur handeling van die uitvoerende of regsprekende gesag. In terme van die sistemiese grondwetlike benadering moet direkte toepassing van artikel 25 slegs geskied indien daar geen administratiewe handeling is nie. Die subsidiariteitsbeginsels moet die gepaste raamwerk identifiseer, om sodoende te voorkom dat daar parallelle regsisteme onder die Grondwet ontwikkel. Heroorweging van die verhouding tussen eiendom en regulasie vorm deel van 'n voortdurende grondwetlike gesprek wat net kan plaasvind wanneer ons uitdruklik met vrae rondom die rol, funksie en status van eiendom en regulasie in die grondwetlike regstelsel omgaan.

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Chapter 1

Introduction

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1 1 Context

“In a free and democratic society, property rights must be limited – they must be regulated – to make them consistent with our commitment to live in a nation of free and equal persons.”¹

Regulation and private property are often depicted as two conflicting notions that exist uncomfortably alongside one another. In this paradigm, regulation inhibits freedom. The research problem investigated in this dissertation is based on the assumption that it is possible to reconceive the relationship between property and regulation in such a way that regulation promotes and protects a variety of constitutional values, including freedom. The legal framework of regulation is what allows the institution of private property to function in a complex, modern society.

The regulation of the use of property is a contentious issue and problems with the regulation of property do not arise in a modular fashion. More often than not, the focus of a dispute regarding the regulation of property will either be the validity of the regulation or the possibility of compensation as an alternative to a declaration of invalidity. This leads to questions relating to either substantive legal principles or the procedural fairness of the process followed. Often the focus falls on the balancing of competing interests or the proportionality of the regulatory measure. While this focus has value, especially for the protection of individual property interests, it is also worthwhile to consider whether the underlying approach to the regulation of the use of property is in line with the Constitution.²

There is currently no clear indication when the validity and effect of regulatory limitations imposed on property will be adjudicated in terms of section 25(1) of the Constitution and

¹ Singer JW “Should we call ahead? Property, democracy and the rule of law” (*publication forthcoming*) 6.

² Constitution of the Republic of South Africa, 1996. Hereafter referred to as “the Constitution”.

when the issue will be dealt with in terms of section 33, read together with the Promotion of Administrative Justice Act (PAJA).³ Because there are indications of an overlap between property law and administrative law pertaining to the regulation of the use of property, guidelines are required to determine which of these two areas of law applies, how the choice is made, and what the relationship between the two sets of constitutional controls is once the decision has been made. If there is a theoretical discrepancy between the approaches to the regulation of property rights in private law and constitutional law or between property law and administrative law, the distinction must be justified for the overall analysis to be theoretically and constitutionally sound.

In *Arun Property Development (Pty) Ltd v City of Cape Town*,⁴ a property developer purchased property with the intention of developing a township on it. Approval for the required rezoning and subdivision depended on whether the development was in line with the existing land use planning framework, including the structure plan.⁵ In terms of the applicable structure plan, provision had to be made for certain primary roads over the property. Arun adhered to the requirements of the planning regime when drawing up its application and approval was subsequently granted for the development, including confirmation of the rezoning of portions of the land to public streets, and conditions pertaining to the design of the road infrastructure.⁶

³ 3 of 2000.

⁴ 2015 (2) SA 584 (CC). Hereafter referred to as *APD*.

⁵ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 7.

⁶ *Arun Property Development (Pty) Ltd v City of Cape Town* [2012] ZAWCHC 399 (31 October 2012) para 5. Section 42(2) of LUPO makes provision for local authorities to impose conditions on developers when granting approval. Arun applied for approval on three occasions for three phases of the development, and each approval was subject to conditions. The High Court specifically emphasised that it was not made a condition of the approval that the road portions had to be ceded without compensation.

The regulatory processes involved in planning law are examples of “regulation” of the use of property as the term is used in this dissertation, namely that it constitutes regulation of the use, exploitation or enjoyment of property.⁷ Regulation, such as the regulatory process set out in the applicable provincial Land Use Planning Ordinance,⁸ is not in itself controversial or problematic; it is an accepted part of organised, modern life. However, regulatory processes (such as the one in LUPO) limit property rights and therefore require regulation or control.⁹ This idea of “regulation of regulation” aptly describes the situation in the property law context, where the imposition of limitations (in the form of regulation) is regulated to ensure adherence to constitutional and statutory requirements. This “secondary regulatory function” can be fulfilled by the principles of either constitutional property law or administrative law, but it is not always clear which regulatory system applies to a specific case.¹⁰

The facts of the *APD* case is an example of exactly this problem, namely that where property rights are limited by regulation, at least two regulatory systems are potentially applicable. The two regulatory systems are either the regulatory framework created by section 25(1) of the Constitution, or the regulatory framework of section 33 of the Constitution, together with PAJA. The regulation of regulation is governed by either one of these regulatory systems, or possibly a combination of the two.

⁷ Regulation is defined in more detail in section 1.5 below.

⁸ 15 of 1985. Hereafter referred to as LUPO. LUPO was an ordinance of the (former) Cape Province, but it is still applicable in the Western Cape. See *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 2 footnote 1. It should be noted here that the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) came into effect on 1 July 2015, which will have an impact on LUPO’s applicability in the Western Cape, although SPLUMA does not explicitly repeal LUPO.

⁹ Administrative law is sometimes described as “the regulation of regulation”. See for example Farina CR “Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power” (2004) 19 *South African Public Law* 489-512 490.

¹⁰ The difficulty of identifying the applicable regulatory system is dealt with in more detail in sections 1.2 and 1.3 below.

This means that a decision has to be made as to which set of controls ought to apply to a specific case. This dissertation addresses the question of how the choice should be made, but it also considers the importance of the relationship between them once that decision has been made, to ensure coherent legal development within a single system of law,¹¹ as mandated by the Constitution.¹² The notion of promoting a “constructive alliance” between sections 25 and 33 is explored further, with the hope of aligning the approach to the regulation of property across these two fields of law, to ultimately support a property system with constitutionally desirable characteristics.¹³

In *APD*, the Constitutional Court framed its decision around the question whether the vesting of excess land constituted an expropriation. It held that section 28 of LUPO compels a loss of ownership and that there is no reason not to apply the relevant rules of statutory interpretation to work out the implications of section 28. One such rule of statutory interpretation holds that the intention to authorise expropriation without compensation should not be imputed to a provision without an express indication of such legislative intent. Moreover, if the provision is interpreted to allow for the transfer of the land without compensation, that interpretation would make the section contrary to section 25(2) of the Constitution, and legislation should be interpreted in line with the Constitution where reasonably possible.¹⁴ Therefore, the section had to be interpreted to allow for compensation. The Court therefore seems to acknowledge a type of *ex lege* expropriation or legislative

¹¹ This principle was set out in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44 and is discussed in more detail in Chapter 4.2.

¹² Section 2 of the Constitution states that the Constitution is the supreme law of South Africa. The implications of constitutional supremacy are discussed in Chapter 4.2.

¹³ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 28 argues in favour of engaging with potential overlaps between fundamental rights to develop “constructive alliances” between provisions in the Bill of Rights.

¹⁴ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) paras 41, 58-59.

compulsory acquisition, describing it as “an *ex lege* transfer of ownership ... [which] has the same effect as an expropriation.”¹⁵

The Court’s approach of starting with the common law to interpret the legislation in question, and thereafter supporting its interpretation with reference to the Constitution, is noteworthy. So is the Court’s consideration of whether section 25 of the Constitution is the appropriate framework to regulate the regulation in question. The Court’s engagement with the question of whether PAJA was applicable to the dispute was brief and superficial. Moreover, expropriation usually involves administrative action, because the decision to expropriate is usually an administrative decision, bringing the matter within the ambit of both PAJA and section 25(2) of the Constitution. However, because the Court held that the transfer in this case happened by operation of law, it concluded that the expropriation falls outside of PAJA’s scope, and must be dealt with entirely within the regulatory framework of section 25 of the Constitution and LUPO. However, the Court’s reasoning on the lack of challengeable administrative action is not persuasive.¹⁶

The *APD* case, like many property regulation cases, can be framed in various ways, depending on the context. For example, regulation disputes can be framed as section 25(1) issues, where the focus would fall on the requirements for non-arbitrary deprivation of property. Because of the uncertainty in South African law regarding the doctrine of constructive expropriation or compensation for regulatory measures “that go too far”, regulation disputes might also be framed as section 25(2) issues, usually with the aim of claiming compensation. Moreover, cases dealing with the regulation of property by administrative action can be brought before the court as applications for judicial review, based on the provisions of PAJA.

¹⁵ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) paras 65-66, 73.

¹⁶ This aspect of the judgment is discussed in more detail in Chapter 4.

In *APD*, the Court briefly considered treating the regulatory process as a purely section 25(1) issue (as a deprivation and not an expropriation).¹⁷ The argument was not accepted by the Court for two reasons. Firstly, the land vested in the municipality without the consent of the owner and secondly, the state had acquired the land in question.¹⁸ However, in *Agri South Africa v Minister of Minerals and Energy*¹⁹ Cameron J, in a separate concurring judgment, emphasised that “[a]cquisition by the state is ... a general hallmark of expropriation. But not necessarily and inevitably so.”²⁰ Even where there is state acquisition, the state action in question will not always amount to expropriation (such as in the case of taxation or criminal forfeiture) and the question of whether the regulatory measure amounts to deprivation or expropriation is therefore not a simple question with a self-evident answer.

Furthermore, the Court did not critically engage with the question of whether this case could not have been dealt with more appropriately in terms of administrative law. Although the possibility of seeking judicial review under PAJA was considered, the court held that Arun would “have to confront a legion of obstacles” to bring an application for judicial review. These obstacles included finding a decision to impugn and seeking condonation for bringing an application for review outside of the 180-day time limit in PAJA.²¹ Given the importance of the outcome of this case, and the relative uncertainty it created regarding *ex lege* expropriations, it is questionable whether this brief and superficial consideration of the applicability of administrative law, as an alternative regulatory framework, is sound.

¹⁷ This argument was put forth on behalf of the City of Cape Town. See *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) paras 54-62.

¹⁸ It was with reference to the acquisition requirement that the Court distinguished the *APD* case from *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC), where the land in question was not acquired by the state.

¹⁹ 2013 (4) SA 1 (CC).

²⁰ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 77.

²¹ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 66.

Even within the parameters of the Constitutional Court's decision that section 25(2) was the appropriate regulatory framework, the question of authorisation is more problematic in the *APD* case than the decision suggests. The Court considered the requirements of section 25(2) when it held that its preferred approach to section 28 of LUPO would align it with the compensation requirement in section 25(2) of the Constitution, but compensation is not the only requirement in section 25(2). The Court arguably failed to address the antecedent question of whether section 28 of LUPO authorises the *particular* expropriation (namely the expropriation of additional land for roads not necessitated by the specific development). An expropriation is arguably only constitutionally valid if law of general application authorises the specific expropriation. On the facts of the *APD* case, it seems plausible that the authorisation question was in fact the heart of the matter, and there should arguably have been closer scrutiny of whether the *ex lege* transfer of the excess land was authorised. On closer consideration, it might have been decided that there was no authorisation for the transfer of excess land. In fact, the Court alluded to this problem when it stated that:

“section 28 [of LUPO], whose constitutional validity is accepted by all, does not authorise any deprivation beyond normal needs. It follows that any deprivation beyond the normal need would take place outside of legislative authority and would thus be arbitrary.”²²

The facts of the *APD* case are one example of the intricate relationship between potentially applicable regulatory systems that have an impact on property. Property and administrative law overlap in a great variety of areas in practice, including planning law, environmental law and expropriation law. There are also indications of a potential overlap (together with section 26 of the Constitution) in the housing context. The overlap between section 25 and 33 of the Constitution is not always easily recognisable; it requires awareness and reflection to identify

²² *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 60.

it and to decide how to deal with it. There are no clear answers or simple steps to follow, but this dissertation proposes some suggestions as to an appropriate methodology for addressing overlap and non-overlap cases in the context of regulating the regulation of property. Because of the single-system-of-law principle, it is necessary to align the approach to the regulation of property across legal fields. In section 1.3 below I set out two approaches to the regulation of property and consider the implications of each in light of the new constitutional dispensation in South Africa.

1 2 Research problem

The research problem that this dissertation addresses revolves around the regulation of the use, enjoyment and exploitation of property, specifically the question of what an appropriate approach to that regulation is in light of the Constitution. At the outset, this dissertation reconsiders a prominent debate in private law, namely whether limitations imposed on property are inherent or external to ownership, and argues that this debate is ill-suited to the constitutional property context because neither characterisation assists with the development of an appropriate approach to the regulation of the use of property in the constitutional dispensation.

In South African constitutional property law there has been a shift away from focusing on the protection of individual property rights toward a stronger emphasis on reconciling individual entitlements with other (constitutional) interests. The inherent/external debate fails to respond to constitutional challenges regarding the nature and role of property and regulation in a constitutional legal system, because it retains the focus on individual rights. This focus makes it impossible to move beyond South Africa's private law doctrinal heritage.

To respond to the shortcomings (for constitutional purposes) of both the theoretical approaches regarding the limitation of property rights in private law doctrine, this dissertation proposes a systemic constitutional approach to the regulation of the use of property as an alternative. The systemic constitutional approach treats the protection of individual entitlements as one aspect of the system (instead of as the whole picture) and views regulation as a mechanism through which a variety of democratic and constitutional values, such as liberty, dignity and participation, are promoted, whilst avoiding the unjust concentration of power, haphazard developments and uncertainty regarding the influence of the Constitution on existing property rights.

In the systemic constitutional approach to the regulation of the use of property, the scope and content of property rights are determined in part by regulation. Both rights and limitations originate from the system. Limitations on property can be imposed *ex lege* by the common law, legislation or the Constitution, or by acts of the administration, the executive or the judiciary. However, the as yet unexplored question of how these different types of limitations are dealt with in the constitutional context raises important questions regarding the basis on which limitations can be challenged, the justification for the effect of limitations and the relationship between potentially applicable areas of law.

The core of the research problem is that the regulation of the use of property is subject to statutory or constitutional controls, and the secondary regulatory process could be governed by either constitutional property law principles in terms of section 25 of the Constitution or administrative law principles in terms of section 33 of the Constitution, together with PAJA, or possibly a combination of the two. This area of potential overlap between property and the right to just administrative action is engaged with to determine how the systemic constitutional approach can assist in identifying overlap cases, how the choice between the

two regulatory systems should be made, and, finally, what the relationship between the systems is after a decision has been made.

In this dissertation four research questions are identified from the context of the research problem. Firstly, which approach to the regulation of the use of property is subscribed to in private law doctrine? Secondly, is the regulatory limitation of property in the constitutional context compatible with either one of the major theoretical approaches in private law, namely that ownership is absolute or unlimited in principle or that regulatory limitations are inherent to ownership, respectively? Thirdly, if neither of the existing theoretical approaches to regulation of the use of property is satisfactory, what is an appropriate approach to the regulation of the use of property for constitutional purposes? Finally, how does the proposed approach respond to potential overlaps between regulatory systems? Below I describe two antithetical approaches to regulation of the use of property in more detail and then provide a brief overview of the chapters to show how the research questions are addressed in the course of the dissertation.

1 3 Two approaches to regulation of the use of property

The regulation of property can be approached in two fundamentally different ways. On the one hand, property can be conceptualised as a natural, pre-social right that is unregulated in principle. Limitations can be imposed, but they are viewed as external and temporary interferences with an otherwise unlimited right. I refer to this as the absolutist approach. The absolutist approach is influenced by themes from the political theory of liberalism.²³ The view of property as a right that provides the individual with protection against an intrusive state is especially influential in private law doctrine, hence the importance attached to the

²³ Davies M *Property: Meanings, histories, theories* (2007) 10.

question whether limitations of property are inherent or external. In terms of the absolutist approach, property is a pre-legal, natural right which protects pre-social rights emerging from relationships between individuals and “things”.²⁴ This view of property makes it possible to regard limitations as interferences with or infringements of property rights, instead of the regulation of property rights that exist only to the extent recognised by law.²⁵

The alternative to the absolutist approach that is proposed here is the systemic constitutional approach, in terms of which property (as a constitutionally-framed right) is never unregulated and rights as well limitations form part of a single constitutionally-framed property system. The systemic constitutional approach refers to a methodology that considers the legal system in its totality, with emphasis on the complex nature of the system as well as the interactions between sub-components (such as different areas of law) of the system. In other words, a systemic perspective means that the regulatory system is seen as a sub-component in a larger system of law, and specifically for purposes of this dissertation as part of a larger *constitutional* legal system.²⁶ Both property rights and their limitations originate from the constitutional system and exist to the extent that they are recognised by that system. Rights are therefore held and exercised in a legal system that always includes the possibility of regulation. Moreover, the system provides for the regulation of regulation, meaning constitutionally framed control over the imposition of limitations. The regulation of property itself is subject to regulation, and there are constitutional and statutory measures in place to ensure that the regulatory measures meet certain requirements.

²⁴ Davies M *Property: Meanings, histories, theories* (2007) 17.

²⁵ Davies M *Property: Meanings, histories, theories* (2007) 16.

²⁶ Systems theory and complexity theory are briefly discussed in Chapter 5, but the systemic elements of the approach that I suggest are predominantly based on the single-system-of-law-principle and supremacy of the Constitution, rather than general or classic systems and complexity theory. Refer to Chapter 4.2 and Chapter 5.2.

Describing limitations as inherent or external is central to the absolutist approach, but not in the systemic approach. The inherent/external question is a problem in private law doctrine because of the underlying assumptions and logic of the absolutist approach with its focus on individual entitlements. In terms of the systemic constitutional approach the question is significantly less problematic because the relationship between rights and regulation is framed differently in the constitutional context. Even if the inherent/external question is analysed in terms of the systemic constitutional approach, it is of limited value because one can recognise the existence of an inherent limitation, but still ask questions about the form and content of the limitation in legislation or other law that creates it. More importantly, one can question the constitutional validity and justification of the limitation. The limitation can change and the change can be seen as a deprivation of property that must comply with section 25(1) without thereby denying that the limitation as such is inherent to the system.

Ultimately, I suggest the systemic constitutional approach not only because it is descriptively in line with the Constitution and the way constitutional cases regarding the regulation of the use of property have been decided, but also based on normative considerations. The normative aspect of the argument is based on the view that property is protected in the Constitution not simply as an end in itself, but as a means for realising other constitutional objectives, and that the extent of protection is determined by the whole system, including private law and public law. Neither one of these can be said to carry more weight than the other, because the entire system is based on the notion of constitutional supremacy.

The systemic constitutional approach differs from the absolutist approach in several important ways. Firstly, in terms of the systemic constitutional approach, limitations (in the form of regulation) are not imposed externally on rights, but exist alongside property rights as an ever-present part of the system. Regulation is seen as a mechanism through which constitutional goals and objectives are promoted and unwanted systemic effects are

minimised. Furthermore, every individual regulation does not require theoretical justification, because it is systemically accepted that property is held and exercised subject to the possibility of regulation, and that the scope and content of property entitlements are determined in part by regulation.²⁷

Secondly, describing property as a fundamentally regulated right does not erode the value of private property because the system is set up to include an element of control over the way in which property is regulated. This is referred to as the “regulation of regulation”. Either section 25 or section 33 of the Constitution (or a combination) can fulfil this secondary regulatory function. The role of administrative law in the property context is conceptualised differently in each of the approaches. In the absolutist approach, administrative action erodes ownership and imposes limitations on property with the effect of diminishing the otherwise complete rights previously held. Owners use the principles of administrative law to curb the exercise of public power and to limit the intrusion of public power upon the private domain. In terms of the systemic constitutional approach, administrative law plays a more facilitative role in the property context to realise constitutional objectives and to balance the protection of property with the public interest, in a way that is constitutionally valid and justifiable.²⁸

The third difference is the role of the various sources of law. The role and impact of the Constitution is limited in the absolutist approach, because any limitation of ownership supposedly diminishes the owner’s rights. The impact of the Constitution is limited to section 25(1) featuring as a means of protecting established common law entitlements from new or more extensive regulation. The same argument can be made for legislative limitations of

²⁷ Singer JW “Should we call ahead? Property, democracy and the rule of law” (*publication forthcoming*) 10-11; Michelman FI “Property as a constitutional right” (1981) 38 *Washington and Lee Law Review* 1097-1114 1098-1099, 1112-1113.

²⁸ The notion of developing a “constructive alliance” between sections 25 and 33 of the Constitution is considered in more detail in Chapter 4.4.

property. The result is that common law is regarded as the primary source of law, which leads to undue weight being attached to common law property rules and principles.²⁹ A different relationship between the sources of law is envisioned in the systemic constitutional approach. Because the legal system is characterised as constitutional, based on the notion of constitutional supremacy, all sources of law derive from and are recognised to the extent to which they are compatible with the Constitution. The extent of constitutional protection of property is shaped by both private law and public law sources of law, the relationship between them in a particular case being determined in accordance with constitutional principles.³⁰

The practical difference between the two approaches can be illustrated with reference to the *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape*³¹ case that dealt, amongst other things, with the question of the extent of an owner's right to exclude persons from his property. The court indicated that the right to exclude is not an absolute or unqualified entitlement and that it is in fact limited in various ways. In effect, the extent of the owner's right has to be determined with reference to the context (which includes an analysis of the nature and function of the property) and with reference to other applicable constitutional provisions, such as the right to life and freedom of movement. Ultimately, the court held that in the constitutional context the owner did not have the right to exclude the

²⁹ Consider, for example, the Constitutional Court's approach in *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) paras 41, 58-59 where the common law rules of statutory interpretation was considered first, and the fact that the interpretation was in line with section 25(2) of the Constitution supported the preferred reading of the statutory provision in question. For a more detailed discussion of the primacy of the common law, see Michelman FI "Expropriation, eviction, and the gravity of the common law" (2013) 24 *Stellenbosch Law Review* 245-263.

³⁰ Van der Walt AJ *Property and constitution* (2012) 19-35.

³¹ 2004 (4) SA 444 (C). Hereafter referred to as *Waterfront*.

beggars in question permanently from its property.³² The court indicated that when a dispute involved two or more opposing fundamental rights of the parties, the tension had to be resolved by optimising each right, in so far as possible, with regard to the limits imposed by the other right.³³ Although the *Waterfront* case purports to adopt a type of balancing or optimisation approach, the reasoning and outcome of the case suggests that the beggars' constitutional rights to life and freedom of movement were not exceptions that imposed external limitations upon the owner's right to exclude. The common law entitlement of an owner's right to exclude is conceptualised differently in the constitutional setting, considering various aspects of the constitutional system in its totality, instead of starting with the assumption that ownership (including the right to exclude) is a fundamentally unregulated right that merely tolerates temporary limitations. If an absolutist approach was followed, it would have been much more difficult for the court to justify the imposition of such a limitation on the right to exclude, and even then the limitation would be seen as an exception to an otherwise unlimited right.

The systemic constitutional approach fits in with the "single-system-of-law" principle that was set out by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*.³⁴ In terms of the systemic constitutional approach to regulation, an owner derives his entitlements from the legal system as a whole, rather than from pre-constitutional arrangements or from a single section in the Constitution that explicitly protects property.

³² Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15-106 49-52.

³³ *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 451.

³⁴ 2000 (2) SA 674 (CC) para 44.

The framework for regulation is deduced from the entire constitutional context and not only from the principles of private law or from section 25 of the Constitution.

In a systemic constitutional approach, the regulation of the use of property could have an impact on various other constitutional rights (either the rights of the property holder or the rights of others). However, the only intersection that is critically engaged with here is that of property law and administrative law, because the latter is an alternative system of regulation, through which the regulation (of property) itself is regulated. Because the use of property can be limited in various ways, one is often faced with the difficult problem of identifying the applicable or appropriate regulatory framework. Limitations on property can be imposed *ex lege* (through the operation of the common law or legislation, as well as the Constitution) or by acts of the executive, the administration or the judiciary. Depending on the source of the regulation, the regulation itself is regulated on the basis of the Constitution, legislation or the common law. This secondary regulatory function usually takes place in the province of either administrative law or constitutional property law. The systemic constitutional approach, together with the subsidiarity principles, offers a way of dealing with the area of overlap in a rational and consistent manner.³⁵ In terms of this suggestion, I argue that the regulation of regulation should primarily be an issue of administrative law, unless the source of the limitation excludes this option. In such a case the next option is direct reference to constitutional principles, which include but are not restricted to the constitutional property principles based on section 25 of the Constitution.

Thus far, the regulation of the use of property in the intersection between property law and administrative law in the constitutional context has remained largely unanalysed and underdeveloped. The overlap between sections 25 and 33 of the Constitution represents an important opportunity to work out how cases dealing with the regulation of property should

³⁵ The subsidiarity principles are discussed in Chapter 4.2.2.

be approached. Additionally, the wording of PAJA is intriguing insofar as it supports the impression that certain post-1994 legal instruments can be interpreted to support the absolutist approach, according to which limitation is viewed as external to rights. But most significantly, the problematic aspects of the regulation of property emphasise that it is important not to view the provisions in the Bill of Rights in a modular fashion. Overlaps exist, although they often only become apparent after careful consideration, and should be engaged with explicitly to develop a methodology in line with the single-system-of-law principle.

1 4 A preliminary proposition

The central hypothesis of this dissertation is that a systemic constitutional approach to the regulation of property under the Constitution is the most appropriate way to address issues arising from the regulation of property. The systemic constitutional approach is proposed as an alternative to the absolutist approach, which has had some influence in private law doctrine. The systemic constitutional approach is particularly relevant with reference to three aspects of the regulation of the use of property, namely the existence of limitations, the validity requirements for limitations and the justification for the effects of limitations.

In the course of the dissertation, I investigate this hypothesis in three contexts before considering the theoretical foundations of the systemic constitutional approach in more detail. There is a degree of overlap between the topics discussed in the chapters, and the division is artificial to some extent. However, it serves the useful purpose of emphasising that a systemic approach is preferable to a modular or compartmentalised approach. Throughout the dissertation, but especially in Chapters 3 and 4, it is evident that many issues pertaining to regulation arise in more than one area of law and that it is difficult and undesirable to try and

solve these problems only within a single area of law, without reference to the broader constitutional matrix and the interconnectedness of the sub-components of the legal system. By acknowledging the connectedness of these issues, legal scholars can address broader normative and methodological questions.

I set out the point of departure in Chapter 2, regarding the relationship between ownership and limitations in private law doctrine. Here we find indications of adherence to the absolutist approach to the regulation of property. This means that property and ownership are conceptualised as pre-social, pre-constitutional rights, with an abstract, absolute and individual nature. In this case, the imposition of every individual limitation (in the form of regulation) on property must be justified, because ownership is viewed as a fundamentally pre-social, unregulated right. However, it becomes evident in this chapter that the absolutist approach is by no means universally accepted, even in private law doctrine, and the position in South African law needs to be re-evaluated in light of the Constitution.

In Chapter 3, I argue that property is not an unregulated, pre-social right. This chapter shows that the regulation of property (as a constitutionally-framed right, as opposed to a constitutionally-guaranteed right) is best explained by a systemic constitutional approach to the regulation of property. In this chapter it appears that the nature of the justification for limitations is different in the systemic approach than the absolutist approach. The question is not whether limitations are inherent to the right, because limitations are inherent to the constitutional system. The requirements for valid deprivation within the system become more important when one accepts that there are always limitations present and that it is a normal part of how the system functions, as long as the requirements for the way limitations are imposed are met. Limitations have to be constitutionally justified within the systemic approach, to ensure that the way in which limitations are imposed is constitutionally valid. However, the constitutional legal system includes controls that do more than ensure due

process. The effects of limitations can also be scrutinised to ensure a measure of proportionality between means and ends. Therefore, I turn my attention to the requirements for a constitutionally valid and justified limitation, specifically in the context of section 25(1) of the Constitution. Chapter 3 includes a comparative section, where article 14 of the Basic Law of the German Federal Republic is considered as an example of a jurisdiction that adopts something like a systemic constitutional approach.

In Chapter 4, I test the hypothesis in the context of the overlap between property law and administrative law to determine whether the systemic constitutional approach to regulation can contribute to more coherent legal development. Essentially, the relationship between these fields of law contextualises the research problem, and specifically helps to consider the constitutional justification of and requirements for deprivation of property, when the limitation is regulated by another field of law, other than (constitutional) property law. According to the systemic constitutional approach, one must assume that property law and administrative law must fit into the single, constitutionally-framed system of law, and that both fulfil some kind of distinct function in relation to the regulation of property. Essentially, both systems of regulation (property law and administrative law) can potentially apply to the regulation of the use of property. When the systemic constitutional approach is followed, it is important to determine when each system finds application and how the choice between them is made. With the systemic constitutional approach there is an additional issue to consider, namely that once the decision has been made, it is important to determine what the relationship (if any) between the two regulatory systems is, especially in light of higher-order constitutional commitments. In other words, it is important to not only set out how the two regulatory systems fit into the system, but also how they are interrelated. The systemic

constitutional approach shows that both these questions are important to avoid the creation of parallel systems of law.³⁶

In Chapter 5, I analyse the theoretical underpinnings of the constitutional systemic approach and consider examples of constitutional systemic thinking in property theory. The theoretical perspectives considered in this chapter illustrate the point that the absolutist approach denies the complexity of the system from which both the right and the regulation arise. The point of the theoretical analysis in Chapter 5 is therefore not to explain the “phenomenon” of regulation in terms of systems theory or complexity theory, but rather to support the argument that it is problematic to describe regulation as something that occurs outside of a complex system, in a reductionist manner.³⁷ Chapter 5 includes a brief discussion of general systems theory and complexity theory in the legal context to introduce systems terminology and consider to what extent (if any) systems theory and complexity theory have influenced property theory.³⁸

This dissertation sets out to prove that in South Africa’s constitutional context, the inherent/external question is less important, because the constitutionally-framed property system requires us to view the relationship between property rights and regulation differently.

³⁶ In a single system of law there should be no unjustifiable parallel legal developments. In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44 the Constitutional Court indicated that there is only one system of law, based on the Constitution. Parallel systems of law are discussed in Chapter 4.5.

³⁷ See for example Luhmann N *Law as a social system* (2004; transl Ziegert KA) 1-53; Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) 1-25.

³⁸ There are systemic elements in various property scholars’ work, which are analysed in more detail in Chapter 5. The scholars that I focus on use systemic reasoning in different ways to reach different outcomes, which make their work interesting for purposes of considering the theoretical underpinnings of the systemic constitutional approach. Compare for example Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726; Smith HE “Emergent property” in Penner J & Smith HE (eds) *Philosophical foundations of property law* (2013) 320-338 to Singer JW *Entitlement: The paradoxes of property* (2000) 140-178; JW Singer “Property as the law of democracy” (2014) 63 *Duke Law Journal* 1287-1335; Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106.

Therefore, instead of focusing on the inherent/external question, the systemic constitutional approach is proposed in an attempt to critically reconsider (and possibly develop) the relationship between property and regulation in the constitutional context by adopting a systemic constitutional approach. Chapter 6 focuses on the conclusions drawn throughout this dissertation and reflects on their implications.

1 5 Terminology

It is especially important (and challenging) to be precise with terminology in the context of problems that arise in more than one field of law. Where necessary, terms are explained at the beginning of every chapter, but it is useful to define a few core terms from the outset.

Firstly, I want to draw attention to the distinction between ownership (the preferred term in private law doctrine) and property (the preferred term in the constitutional setting). The notion of property is foreign to South African private law, where “things” are the objects of real rights and ownership refers to the most comprehensive right one can have over a thing.³⁹ In Anglo-American common law (as opposed to civil law) the terminology is less problematic since “property” is widely used in private and public law.⁴⁰ Common law jurisdictions do not have the same technical, formal definition of ownership as the civil law tradition. Moreover, property is less of a physical notion in common law, especially in, for example, post-Realist American law, where property refers to the right and not the object of the right.⁴¹

³⁹ The origin and development of the definition of ownership is discussed in Chapter 2.

⁴⁰ Cotterrel R “The law of property and legal theory” in Twining W (ed) *Legal theory and common law* (1986) 81-98 87, 95.

⁴¹ Van der Walt AJ *Property and constitution* (2012) 114.

Gray and Gray define the term property as “an abbreviated reference to a quantum of socially permissible power exercised in respect of a socially valued resource.”⁴² What is particularly useful of this definition is the clear distinction between the relationship of control over the thing and the actual thing or resource, which ought not to be conflated or equated. Property is not the thing itself, but “particular concentrations of power *over* things”.⁴³ The question is how much power the system allows the property holder at any given time.

I use the term “ownership” specifically in Chapter 2 when dealing with private law doctrine, but I generally use “property” throughout the dissertation because “ownership” is a narrower term with limited value in the constitutional and regulatory context. The idea of being “owner” of a “thing” could, especially in private law doctrine, obscure the fact that holding individual property rights in a resource cannot exclude a degree of regulatory control over the use of that resource. More importantly, it might seem to deny the complexity of the system of which property and regulation form part. Therefore, the term “property” is used to refer to power over things and not to the “things” themselves.⁴⁴

“Regulation” and various forms of this term (including “regulatory measures”, “regulatory limitation”, “regulatory process” and “regulatory restriction”) are usually used to indicate state involvement, and specifically to refer to the police power of the state, to regulate the use of property in the public interest or for a public purpose.⁴⁵ “Regulation” is used throughout this dissertation in this wide sense to refer to any public action that affects the use, enjoyment

⁴² Gray K & Gray SF “The idea of property in land” in Bright S & Dewar J (eds) *Land law: Themes and Perspectives* (1998) 15-51 15.

⁴³ Gray K & Gray SF “The idea of property in land” in Bright S & Dewar J (eds) *Land law: Themes and Perspectives* (1998) 15-51 15. (Emphasis in original.)

⁴⁴ Gray K & Gray SF “The idea of property in land” in Bright S & Dewar J (eds) *Land law: Themes and Perspectives* (1998) 15-51 15.

⁴⁵ Murphy J “Property rights in the new constitution: An analytical framework for constitutional review” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 623-644 630.

or exploitation of property. As a manner of shorthand, I often refer simply to “regulation of property” or “regulation of the use of property”, but unless the context indicates otherwise, it should be understood to refer to regulation which in principle can affect any incident of a property right. The notion of the “regulation of regulation” or the “secondary regulatory function” is used in this dissertation to describe statutory or constitutional controls that govern regulatory processes through either section 25 or section 33 (together with PAJA) of the Constitution. This notion is a central feature of the systemic constitutional approach.

The term “limitation” is also significant, and is used in various ways in the literature.⁴⁶ In the constitutional context, limitation refers to the “infringement” (“restriction”) of a right in the Bill of Rights, which can possibly be justified in terms of the general limitation clause, section 36 of the Constitution, or limitation provisions in other sections of the Bill of Rights.⁴⁷ The term “limitation” is also used (especially in pre-constitutional literature) to generically refer to curtailment of property rights in the widest sense. Limitation is the result of regulatory measures that are imposed on property. Thus, regulation results in the limitation of property rights, in the sense of the second, general meaning of limitation, but not necessarily in the technical, constitutional sense. However, “deprivation” (in terms of section 25(1) of the Constitution) is not synonymous with a limitation of the section 25 right in the technical, constitutional sense. Only an unauthorised or arbitrary deprivation is a limitation of property in terms of section 25(1) of the Constitution.

⁴⁶ Rautenbach IM “The limitation of rights in terms of provisions of the bill of rights, other than the general limitation clause: A few examples” 2001 *Tydskrif vir die Suid-Afrikaanse Reg* 617-641 618.

⁴⁷ See section 7 of the Constitution. Also see Woolman S & Botha H “Limitations” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 2 (2nd ed RS 5 2013) 34-1 – 34-136 at 34-4; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 264-265; Rautenbach IM “The limitation of rights in terms of provisions of the bill of rights, other than the general limitation clause: A few examples” 2001 *Tydskrif vir die Suid-Afrikaanse Reg* 617-641 618.

The various meanings of absoluteness are discussed in Chapter 2, but the meaning that is especially problematic in the context of this dissertation is when absoluteness conveys the idea that property is fundamentally absolute in the sense of being a pre-social, unregulated right that merely tolerates exceptional (and usually temporary) limitations. This meaning of “absolute” is the basis of the absolutist approach.

Finally, I distinguish between the systemic constitutional approach and a systems approach based on general systems theory. In general system theory and complexity theory, it is commonplace to refer to a “systems approach” when developing or applying ideas based on systems or complexity theory.⁴⁸ In this dissertation the term “systemic approach” is preferred, specifically to differentiate it from the term used by proponents of general systems theory, since the systemic constitutional approach is derived from the single-system-of-law principle and not from classic systems theory.⁴⁹

1 6 Methodology

The primary methodology relied on in this dissertation is a literature study to determine what the approach to the regulation of property is in private law, and to assess whether it is compatible with the approach in constitutional law.

It does not fall within the ambit of this study to undertake a comprehensive historical analysis of private ownership – there is adequate discussion of the topic in the literature and therefore I rely on secondary sources for large parts of especially Chapter 2. The discussion in that chapter is not aimed at a primary or a critical analysis of the sources of private law

⁴⁸ See for instance Blauberger IV, Sadovsky VN & Yudin EG *Systems theory: Philosophical and methodological problems* (1977, transl Syrovatkin S & Germogenova O) 15.

⁴⁹ General systems theory and complexity theory are briefly discussed in Chapter 5 to make precisely this point, namely to distinguish the systemic constitutional approach from a systems approach.

property, but rather a thematically-structured look at the doctrinal discussions of ownership; the approach is therefore mainly descriptive. The thematic discussion aims to show that there has been a tendency at various times in the past to describe ownership in a more responsive light with limited success, because the possibility of such a description of ownership within the tradition of private law doctrine is limited.

From Chapter 3 onward, I increasingly rely on primary sources, such as the Constitution, case law and legislation, but also critically engage with secondary sources. Chapters 3 and 4 consist mainly of a constitutional analysis of the regulation of the use of property, focusing on the regulatory frameworks created by sections 25 and 33 of the Constitution respectively and how these sets of constitutional controls function in relation to one another with reference to the regulation of property.

In Chapter 5, property theories are analysed from a systemic constitutional point of view, with the purpose of evaluating and comparing their systemic elements. General systems theory and complexity theory are briefly discussed for three reasons. Firstly, it serves as a brief overview of the development of systemic thinking to introduce systems-terminology. Secondly, it supports the argument that the absolutist approach to the regulation of property denies the complexity of the property system by focusing on the individual right in an abstract manner and by treating limitations as something separate from or external to the framework in which the right exists. Thirdly, the discussion shows that the property theory proposed here is not a continuation or development of classic systems or complexity theory.

The theoretical component of this study is not intended to serve as an overview of all potentially relevant property theory. Instead, I selected a few theoretical arguments because of their systemic elements, to consider where the systemic constitutional approach suggested in this dissertation fits into the existing property theory landscape.

Engaging with the overlap between property law and administrative law provides the biggest challenge from a methodological point of view. The point of departure is that in order for this dissertation to be manageable, the focus area of the problem would have to be limited, both in scope and in content. This means that corresponding themes and issues that relate to the overarching notion of regulation of property are identified in property law and administrative law. The selection does not amount to a complete or even extensive comparison of the two regulatory systems. The result of this decision is a “bird’s-eye” view of the central theme of regulation of the use of property, with a strong focus on synthesis, in addition to analysis. Waring has stated that this type of “bird’s eye” approach to certain legal problems has merit, especially when the method is used in studies that are broad in scope and aim to give a first broad overview and assessment of the problem, while providing the foundation for further analytical research (where a doctrinal methodology would feature more prominently).⁵⁰

This dissertation arguably falls in this category that Waring identifies and therefore I only offer tentative suggestions regarding an appropriate methodology for this type of legal problem and for an appropriate approach to the regulation of the use of property in the South African constitutional context, in the hope that it will create the foundation for future academic work. Because of the “bird’s eye” approach, I do not consider the implications of the systemic constitutional approach in specific contexts (like the environmental or expropriation contexts) in detail. However, I postulate that it would be an effective mechanism for addressing overlaps in those cases as well. This dissertation has a more general research objective, but future research might focus on more specific aspects of its application.

⁵⁰ Waring E *Aspects of property: The impact of private takings* (2009) 14.

In a similar vein, the comparative aspect of this dissertation is limited and not intended to serve as an in-depth or comprehensive comparative analysis. I focus on very specific aspects of property and regulation in German constitutional law as a form of the functional method of comparative law.⁵¹ I chose German law because of the wording and structure of its constitutional property clause, specifically the formulation of article 14.1.2 of the German Basic Law, which states that the content and limits of property is determined by law as it stands at a specific time. The formulation of the property clause, together with the fact that German private law is codified, points toward a systemic constitutional approach to the regulation of the use of property. The German property clause differs in certain fundamental ways from the South African property clause, but it is useful to consider its implications for the approach proposed in this dissertation.

The comparative analysis concentrates on article 14 because it represents an example of the systemic constitutional approach to regulation. I do not set out to do a complete comparison of the two jurisdictions, partly because such an extensive study has already been done,⁵² but also because it would have added very little value to this dissertation, because this study is not concerned with the other aspects of the property clause (in either South African law or German law). The value of the comparative analysis is to support the argument in favour of a systemic constitutional approach in the South African context, as an example of how such an approach functions, albeit in a different legal, social, and economic context.

In the preceding sections, I set out what the purpose of the dissertation is. Even more important is to set out what it is not. The central theme of property and regulation offers an

⁵¹ Akkermans B “The comparative method in property law” (2014) 3 *Property Law Review* 203-211 205-206.

⁵² See in general Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002); Mostert H “Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law” (2010) 127 *South African Law Journal* 238-273.

endless variety of aspects to focus on and many important questions come up along the way. Answers to several of these questions are assumed in order to limit the scope of the study. For example, questions regarding what is (or ought to be) included in the definition of constitutional property were largely left untouched, and I only briefly consider the “new property” debate.⁵³ For purposes of this dissertation, the focus is not whether the constitutional property concept include interests that are not traditionally regarded as “property” in common law, but rather to determine what property law is and what it should do.⁵⁴

If property is not necessary to protect other constitutional non-property interests (such as dignity or equality) in a complete Bill of Rights, it is not a political but an economic right, and we should deflate the notion accordingly. However, I argue that property has a role to play as a constitutionally-framed, political right, and not only as an embodiment of economic freedom, and therefore that property for constitutional purposes should be interpreted widely. The relevance of this question recently surfaced in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others*,⁵⁵ and although the definition of property for constitutional purposes is an interesting and important question, it is not central to the research problem that I engage with in this dissertation.

Historically relevant questions such as justifications for the institution of private property also fell outside the scope of the dissertation, since my point of departure is that both property and regulation are essential parts of modern life, which makes a critical consideration of the justification for its existence superfluous for purposes of this dissertation.

⁵³ The new property debate is briefly referred to in Chapter 3.4.

⁵⁴ Van der Walt AJ *Property and constitution* (2012) 131.

⁵⁵ [2015] ZACC 23 (30 June 2015).

This dissertation does not address the customary law tradition and conceptualisation of property. The influence of customary law on the constitutional notions of property and regulation has not yet been established. I would argue that it should have an impact on how property and regulation are viewed in the constitutional context, especially in light of the single-system-of-law principle. For purposes of this dissertation an additional field of law would have made the scope of too broad. The primary purpose of this dissertation was to give an overview and first assessment of the problem. However, the systemic constitutional approach should arguably create ample space for customary law to be considered when necessary, and it should in principle create awareness of any area of overlap with property law principles in the constitutional legal system, and not only the area of overlap that I set out in Chapter 4.

Furthermore, despite the focus on synthesis and unity of the legal system, this dissertation does not propose a so-called “theory of everything” or grand unified theory of regulation of the use of property. It does not propose a metanarrative of property and regulation. The research objective is to reconsider the best approach to the regulation of property and to critically engage with the intersection between property law and administrative law in one very specific context, namely the regulation of property.

Finally, it is central to the validity of the conclusions in Chapter 6 that the systemic constitutional approach is developed on the assumption that it functions as part of a constitutional system where both property and administrative justice are entrenched and justiciable rights. It may very well be that these aspects are necessary conditions for the systemic constitutional approach to function as it is described and envisioned in this dissertation. The systemic constitutional approach is thus very context specific and its features are informed by the structure of the South African constitutional legal system. However, as the theoretical perspectives in Chapter 5 show, many aspects of a systemic

approach are universal, and can address similar issues in other jurisdictions with a different legal structure, despite certain doctrinal differences.

Chapter 2

Ownership and limitations in doctrinal thinking

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2 1 Introduction

Ownership is said to be one of the most important institutions of private law.¹ Cowen goes so far as to suggest that landownership falls into the same class of “basic familiar things” as life, death, sex and friendship,² and Birks remarks that it is human nature to hanker for ownership.³ With this as backdrop, it is clear that ownership is a fundamental part of modern life and that the regulation of the use of property is an issue worthy of consideration.⁴

One of the research aims of this dissertation is to reconsider a prominent debate in private law, namely whether limitations are inherent or external to ownership, and to determine how this problem is addressed in constitutional property law. This chapter sets out the historical and doctrinal frameworks within which the regulation of property occurs. In particular, this chapter considers the nature, characteristics and historical development of ownership, as well as the status and role of regulation in private law doctrine.

By determining the doctrinal position regarding the regulation of property, a foundation is laid for examining whether (and, if so, how) the influence of the Constitution makes it necessary to re-examine the approach to the regulatory limitation of property. It is not universally acknowledged that the Constitution had any influence on ownership. In *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*⁵ the court was of the opinion that the right of ownership as understood before the advent of the Constitution was unaffected by the provisions of the

¹ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 1; Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 107; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 91.

² See Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 1, where he discusses the role of landownership as part of this class of “basic familiar things”.

³ Birks P “The Roman law concept of *dominium* and the idea of absolute ownership” 1985 *Acta Juridica* 1-37 7.

⁴ Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 55 refers to this as the “systematic importance of property”, to indicate the important role that property plays within a scientific and abstract system of rights.

⁵ 2000 (4) SA 468 (W).

Constitution.⁶ In this dissertation, I argue that this view is false and that the Constitution in fact requires a new understanding of how property and regulation function in society. However, before turning to the constitutional analysis on this point, I set out the origins of absolutism in private law doctrine and consider how it continues to influence legal doctrine.

2 2 Background and terminology

A doctrinal study of property is a necessary part of understanding the role and function of property in law, but it does not and cannot represent the whole picture.⁷ The institution of ownership is influenced by social, economic, political and legal factors.⁸ Ownership is not separate from the social context in which it operates.⁹ Ownership has been highly conceptualised,¹⁰ and the concept does not necessarily reflect the contextual nature of the institution, which means that it makes little sense to merely determine what has been understood under the concept of ownership up to now. However, by looking at “some of the critical moments in the establishment of the private-law property concept”, important aspects of the historical development of the definition of ownership and its underlying assumptions come to light.¹¹ The process of defining ownership is closely linked to the construction of a hierarchy of rights, because all other property interests are defined with reference to

⁶ *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 10.1.

⁷ Dixon M “A doctrinal approach to property law scholarship: Who cares and why?” (2014) 3 *Property Law Review* 160-165 164.

⁸ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 91.

⁹ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 17-18.

¹⁰ Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 17, 54.

¹¹ Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 17.

ownership. Because property interests are defined abstractly and in relation to how they compare with ownership, it was possible to create an abstract, hierarchical system of rights.¹²

Property rights are to a certain extent still organised in a hierarchical way in South African private law doctrine, where a personal right is always trumped by a limited real right; the latter in turn being trumped by the only full real right (that is, ownership).¹³ This is the typical fixed hierarchy of civil law.¹⁴ With this in mind, the importance of ownership as the proverbial trump-all in property law cannot be overstated.

Although this hierarchical system can be criticised, it shows why ownership is viewed as the pinnacle right, which in turn emphasises the importance of explaining how and why the (inherent or external) limitation of ownership is such an important but contested point in private law doctrine. The doctrinal and hierarchical supremacy of ownership is often linked to the absoluteness of ownership, which is discussed in more detail below.¹⁵

However, this hierarchal paradigm has come under pressure. In *Port Elizabeth Municipality v Various Occupiers*¹⁶ the Constitutional Court of South Africa indicated that a fundamental shift is required in terms of the Constitution. The abstract system of rights needs to make way for a more contextual, non-hierarchical way of thinking about property.¹⁷

Before embarking on a more detailed discussion of the characteristics of ownership, it is necessary to say something about the terminology used to discuss the characteristics. An

¹² Van der Walt AJ *Property in the margins* (2009) 29.

¹³ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 21.

¹⁴ Van der Walt AJ *Property in the margins* (2009) 28. Some differences between civil law and common law are mentioned in section 2.3.3 below.

¹⁵ Van der Walt AJ *Property in the margins* (2009) 32.

¹⁶ 2005 (1) SA 217 (CC) paras 11-23. Hereafter referred to as *PE Municipality*.

¹⁷ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 521. This shift is discussed in more detail in subsequent chapters.

overview of the literature makes it clear that inconsistent use of certain terms has contributed greatly to what is already a convoluted topic and in an attempt to sidestep the same pitfalls, certain terms are explained briefly below.

Defining a controversial term such as “ownership” briefly is no easy feat.¹⁸ In *Gien v Gien*¹⁹ the court defined ownership as the most comprehensive real right a person can have over a thing, subject to the limits of the law.²⁰ This definition is used as the point of departure when referring to ownership in South African law.

A core term to define in the context of this dissertation is “absoluteness”. The term is used by various authors in different contexts to convey different characteristics of ownership,²¹ and it is central to one of the primary theories put forth in private law to explain the existence and legitimacy of limitations. The trend in the literature is to focus on absoluteness as a characteristic of specifically ownership (as opposed to the broader notion of property), since ownership is the only property right that lends itself to description in terms of absoluteness. Other property rights are limited in their very nature and description and therefore a discussion of absoluteness only makes sense in the context of ownership.²²

¹⁸ Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 3; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 295.

¹⁹ *Gien v Gien* 1979 (2) SA 1113 (T). The origins of the definition will be discussed in greater detail in section 2.3.2 below.

²⁰ *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

²¹ Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 144 argues that the term “absolute” is probably one of the most ambiguous and imprecise terms used in any discussion pertaining to ownership.

²² Van der Walt AJ *Property and constitution* (2012) 114-115.

Absoluteness is used to describe at least four different aspects or characteristics of ownership.²³ When referring to ownership as being “absolute” (or not), authors intend to convey vastly different ideas, although without careful analysis the differences are more often than not unclear and uncertain. This can have particularly serious consequences where authority for a particular view is cited, without due concern for the confusion that surrounds the manifold uses of the term.

Firstly, absoluteness can be understood to mean that ownership is a real right that is absolute in the sense that it is enforceable “against the whole world”.²⁴ In this sense, absoluteness is a characteristic of all real rights (ownership and limited real rights) which all have an *in rem* nature that makes them generally enforceable.²⁵ This meaning does not relate to the debate on the nature of limitations, although it does relate to the hierarchy of rights, because it is a distinguishing characteristic of real rights, as opposed to personal rights. Furthermore, absoluteness in this sense creates certain legal presumptions that can determine the point of departure during adjudication of property disputes. The presumptions in this case relate to vindication, namely who is bound by the right and the manner in which the right is enforced or vindicated.

Secondly, absoluteness is often used to describe ownership as a non-fragmented and unitary right and to convey that ownership is a singular notion.²⁶ In this sense absoluteness is a synonym for uniformity or totality. This meaning of absoluteness has no bearing on the

²³ Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 213.

²⁴ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 295; Van der Merwe CG *Sakereg* (2nd ed 1989) 12; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 51.

²⁵ Van der Merwe CG *Sakereg* (2nd ed 1989) 170 indicates that the notion of property as absolute, in the sense of being enforceable against the world at large, stems from Roman-Dutch law.

²⁶ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 295; Van der Merwe CG *Sakereg* (2nd ed 1989) 13.

topic of the nature of limitations either, but it creates presumptions regarding the creation and transfer of rights. A presumption of alienability, for instance, is not a problematic result stemming from this characteristic of ownership.

Thirdly, absoluteness is used to convey the idea that ownership is the most comprehensive and complete right that a person can have over a thing.²⁷ This indicates that in principle the owner holds all the entitlements over a thing.²⁸ Typically, this description is used to differentiate between ownership (as the only complete real right) and limited real rights,²⁹ and is the source of the perception that ownership is the most valuable and most important property right.³⁰ Absoluteness in this sense is not doctrinally problematic, but it does relate to the private law debate that deals with the nature of limitations. In terms of presumptions created by this meaning of absoluteness, one can say that it creates a presumption of a use entitlement in favour of the owner.

Fourthly, absoluteness can mean that an owner can do whatever she wants with her property (so-called free use), unless a particular use is prohibited by law.³¹ Historically, this

²⁷ Van der Merwe CG *Sakereg* (2nd ed 1989) 169. This is the definition endorsed in *Gien v Gien* 1979 (2) SA 1113 (T) 1120 that was mentioned above. Also see Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 19-20; Sonnekus JC “Property law in South Africa: Some aspects compared with the position in some European civil law systems – The importance of publicity” in Van Maanen GE & Van der Walt AJ (eds) *Property on the threshold of the 21st century* (1996) 285-331 300.

²⁸ Van der Merwe CG *Sakereg* (2nd ed 1989) 169.

²⁹ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 19-20; Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 34; Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 214.

³⁰ Van der Walt AJ *Property and constitution* (2012) 114.

³¹ Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 213; Van der Walt AJ “The South African law of ownership: A historical and philosophical perspective” (1992) 25 *De Jure* 446-457 446.

is the definition of *dominium* that Bartolus relies on to distinguish it from *possessio*,³² which is doctrinally unobjectionable insofar as it merely identifies a presumptive starting point, while taking it for granted that limitations imposed by law are always possible and to be expected. In that form, which largely survived in Roman-Dutch law, the notion of absoluteness as freedom from limitation indicates nothing more than a presumptive or evidentiary point of departure,³³ without implying that limitations on ownership are in anyway normatively problematic or unusual. However, over the course of centuries this same definition also acquired the air of a normative judgment about the existence or legitimacy of limitations, and eventually it became associated with the assumption that ownership is a pre-social right, the absoluteness of which guarantees private freedom against state interference. Limitations imposed upon ownership are therefore by definition external, later in time, and in principle to be treated with the necessary circumspection.

This is the essence of the absolutist approach, and the most controversial meaning of absoluteness. Absoluteness in this sense directly affects the topic of limitation, by creating a strong, normative presumption against limitation. If ownership is absolute (as meant here), the point of departure is that it is treated as a pre-social, fundamentally unlimited right that is only subject to the will of the owner. This is essentially the Pandectist definition of ownership, which is discussed below.³⁴ Absoluteness, in the sense that an owner can do with

³² See Feenstra R *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht* (1990) 37-41; Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 307; Visser DP “The absoluteness of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39-52 43. Bartolus’ definition is discussed in section 2.3.2 below.

³³ Van der Merwe CG *Sakereg* (2nd ed 1989) 172 states that the notion of (fundamentally) unlimited ownership, which can be limited by the legislature in exceptional circumstances, is expressed by the procedural rule that ownership is regarded as unlimited in principle, and that the person relying on a limitation bears the burden of proving the existence and scope of the limitation.

³⁴ Refer to the discussion in section 2.3.4.

her property whatever she wishes unless expressly prohibited by law, is intimately linked with economic liberalism and the view that ownership provides a guarantee for personal freedom, which in turn leads to the view that the thing owned and the actions of non-owners relating to it are subject to the owner's will, and that the owner's freedom should not be unnecessarily limited.³⁵ As long as ownership is defined as the right to do whatever is not prohibited it can be described as absolute in some sense.³⁶ This view is explored in more detail below. The terms "absolute" or "absoluteness" are used in this study to refer to this fourth meaning, unless indicated otherwise.

Various characteristics of ownership have been emphasised (often not explicitly) as being more important than others, leading to a skewed view of the content and nature of ownership. Below, I discuss in more detail what the characteristics of ownership are, analyse the importance of each characteristic and its implication for the effective regulation of property and finally, consider whether a progressive view of ownership is possible within the existing doctrinal framework. The purpose of discussing historical developments is to highlight the dynamic nature of ownership and to show how the institution has adapted to different societies at different times, according to economic or social pressure.

An overview of the literature on this topic indicates that it is discussed by prominent property scholars who hold diverging views on what the essence of property is and, correspondingly, what the characteristics of private ownership are. Furthermore, there are differing opinions regarding the manner in which an inquiry into the nature and

³⁵ See the discussion of this viewpoint by Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 447.

³⁶ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 26; Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" 1992 *De Jure* 446-457 457.

characteristics of ownership ought to be conducted.³⁷ In this section I discuss the general characteristics broadly accepted by most academics, with specific emphasis on those characteristics that explain the absolutist doctrinal approach to limitations on ownership.³⁸

As a point of departure, ownership is characterised as a “mother right”, which means ownership is a right from which other rights are derived.³⁹ An owner can grant a number of personal or limited real rights over his property to another person, because of his entitlements as owner of said property. The characterisation of ownership as a mother right has significant implications and is closely related to other characteristics of ownership, which are discussed below.

Ownership is regarded as a singular right and therefore it is characterised as “individual”.⁴⁰ There is only one form of ownership and more than one person cannot be owner of the same thing simultaneously,⁴¹ with the exception of co-ownership, where co-

³⁷ See, for example, Van der Merwe CG *Sakereg* (2nd ed 1989) 173-176; *contra* Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 113-128; Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 580-584; Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 105-147.

³⁸ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 34; Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 582. Also see Van der Merwe CG *Sakereg* (2nd ed 1989) 175-176, who discusses the general characteristics of real rights, since these characteristics are part of ownership as well. According to Van der Merwe, the only distinguishing characteristic of ownership is that it is an independent real right that grants the most comprehensive entitlements over a thing.

³⁹ Van der Merwe CG *Sakereg* (2nd ed 1989) 175.

⁴⁰ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 21.

⁴¹ In this context, ownership can also be described as uniform or singular, as opposed to pluriform or fragmented. See Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 34; Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 214.

owners own a thing in undivided shares.⁴² This characteristic implies that the owner is entitled to grant rights to others, but the decision resides solely with the owner, since this characteristic is closely related to the mother-right status of ownership. A second implication of this characteristic is that the owner can exclude all others from using his property.⁴³ The right to exclude as an entitlement of ownership is closely linked to the absoluteness of ownership. Ownership is also in principle not limited in duration and therefore it is characterised as “indeterminate”.⁴⁴ Its indeterminate nature does not make ownership absolute. The importance of absoluteness as characteristic of ownership is explained below.

Furthermore, ownership is characterised as abstract in the sense that it is more than the sum total of its entitlements.⁴⁵ Because of the abstract nature of ownership, the sum total of individual restrictions cannot determine the nature of ownership either.⁴⁶ Honoré refers to this as the “residuary nature” of ownership and explains that an owner may alienate his entitlements to third parties but remains the “ultimate residuary”.⁴⁷ This characteristic is closely linked with the elasticity of ownership.

⁴² Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 214.

⁴³ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 21; Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 573, 576.

⁴⁴ Van der Merwe CG *Sakereg* (2nd ed 1989) 175.

⁴⁵ Van der Merwe CG *Sakereg* (2nd ed 1989) 16-17; Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 18.

⁴⁶ Van den Bergh GCJJ “Schijnbewegingen. Herodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404 403; Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 596-589 575.

⁴⁷ Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 126-128 discusses the concept of ownership through an exposition of the incidents that are said to make up ownership, instead of focusing on the characteristics. According to Honoré, residuary is an incident of ownership. The

The elasticity of ownership means that ownership is able to tolerate limitations, but that all limitations are regarded as temporary and unnatural and that ownership will return to its original and complete form eventually.⁴⁸ Limitations do not permanently diminish the completeness of ownership or alter the nature of ownership.⁴⁹ The image of an elastic ball is sometimes used to explain this notion: it can tolerate some interference, but will resume its original (full) form as soon as the imposed burden falls away.⁵⁰ Elasticity is sometimes referred to as the “minimum residual right” to indicate that no matter how many limitations are placed on ownership, the owner will retain the reversionary right.⁵¹ This characteristic is subject to criticism, since numerous limitations are in fact permanent in nature, such as the owner’s susceptibility to loss of ownership through prescription and expropriation. The characteristic of elasticity is not easily reconcilable with the notion that an owner may be permanently divested of his property. Despite practical examples to the contrary, elasticity is regarded as a characteristic of ownership that ties in with the abstract completeness of

distinction between characteristics and incidents is not central to this study, but the issue is discussed by Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 110, 112-113; Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 20-21; Van der Walt AJ “Rights and reforms in property theory – A review of property theories and debates in recent literature: Part III” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 493-526 511; Lewis C “The modern concept of ownership” 1985 *Acta Juridica* 241-262 242.

⁴⁸ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 20; Van der Merwe CG *Sakereg* (2nd ed 1989) 175; Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 576, specifically (g).

⁴⁹ Van der Walt AJ “The South African law of ownership: A historical and philosophical perspective” (1992) 25 *De Jure* 446-457 447. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 175, where Van der Merwe states that elasticity is not exclusive to ownership, since it is a characteristic of all mother rights.

⁵⁰ *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 10.1.

⁵¹ Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 76 argues that the term “minimum residual right” was coined by Sir Frederick Pollock and that Romanists often use the term “elasticity” to describe the same “essential criterion of ownership”.

ownership in the sense that limitations are regarded as external and temporary and that ownership will return to its original, complete form in due course.

In South African law the uniformity of ownership is often viewed as a characteristic dating back to Roman and Roman Dutch law,⁵² but academics have shown that a concept of divided ownership was recognised and developed to some extent by Roman and Roman Dutch jurists.⁵³ The *numerus clausus* principle potentially serves as a guarantee against fragmentation by prohibiting the creation or recognition of other types or categories of property rights. In South African law it appears to be generally accepted that the *numerus clausus* principle applies, but even where it is disputed (in the sense that South Africa has an open system of property rights) ownership is a unitary right because of the requirements for acquisition and transfer.⁵⁴

These characteristics of ownership in private law doctrine emphasise the role of property as the embodiment of economic freedom and its status as being subject to the free will of the owner, which corresponds with the absolutist approach to regulation of the use of property. In the next section, I set out certain critical moments in the development of a definition (and corresponding characteristics) of ownership, to consider why certain aspects that support absolutism have been emphasised or developed and how this continues to influence South African law. The purpose of the historical and doctrinal overview below is to determine the origins of the private law debate regarding the nature of limitations, to establish what the relationship between property and regulation is in private law doctrine.

⁵² *Lucas' Trustees v Ismail and Amod* 1905 TS 239 247.

⁵³ See Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 7; Van der Walt AJ & Kleyn DG "Duplex dominium: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 225-228; Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 118-122.

⁵⁴ Van der Walt AJ *Property and constitution* (2012) 115. Also see Akkermans B *The principle of numerus clausus in European property law* (2008) 6-7.

2 3 Thematic discussion of certain historical developments

2 3 1 Introduction

Private property plays a central role in society.⁵⁵ As such, ownership cannot (and arguably should not) be regarded as independent from the society in which it operates. It is a dynamic institution, able to adapt to the ever-changing social, economic and political demands of society.⁵⁶ Moreover, ownership is not ideologically neutral. As a social institution, it has been influenced by a wide range of social factors and has undergone many developments over time.⁵⁷

This is not a comprehensive or critical historical analysis of private ownership – there is adequate discussion of the topic in the literature and therefore I mainly rely on secondary sources. The thematic discussion that follows primarily aims to show that there has been a tendency or desire at various times in the past to make ownership more “socially

⁵⁵ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 2-4; Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 6-35 18; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 2-6.

⁵⁶ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 1.

⁵⁷ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 34; Visser DP “The absoluteness of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39-52 39. A discussion of the historical development of the concept of ownership creates the impression of a chronological progression of historic events that follow a neat, linear pattern. However, ownership has been influenced by various social, political and economic factors. This makes a linear discussion of historical development unsatisfactory and impractical. I therefore propose to focus on certain significant developments, despite the fact that, chronologically, they might not follow one another directly but rather overlap to a certain extent. For a more detailed discussion see, for example, Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 8, 11.

responsible”. The means through which societies have hoped to achieve this end has been diverse, with varying levels of success.⁵⁸

2 3 2 *A bird’s eye view of the development of ownership*

The details regarding the origin of the institution of ownership are obscure, but ownership (in some form) was known since the pre-classical Roman law era and therefore Roman law provides a starting point for a discussion regarding the historical development of ownership.⁵⁹

The term *dominium* was presumably first used by the jurist Labeo in the pre-classical period (250-5 BC), although it was not expressly or formally defined and not used in the technical legal sense we associate with ownership today.⁶⁰ The development of a distinct notion of ownership can be traced to classical Roman law (5 BC-250 AD), where ownership became separated from other real rights, specifically as a right distinct from possession.⁶¹

⁵⁸ The approaches include, for example, fragmentation (ownership can be “split up” or divided amongst more than one owner) and specialisation (property rules depend to a certain extent on the type of property in question, also known as functionalism) or by working within Bartolus’ definition by shifting the focus back to the balanced approach of the original definition taken in its proper context, instead of viewing the definition as authority for the Pandectist view of ownership as absolute, abstract and universal. See in general Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 534-541; Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 2-4, 34.

⁵⁹ Birks P “The Roman law concept of dominium and the idea of absolute ownership” 1985 *Acta Juridica* 1-37 3; Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 305; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 297.

⁶⁰ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 306-325 310.

⁶¹ Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 217.

Cowen states that the Roman idea of *dominium* as *plena in re potestas* can mainly be attributed to the late-classical and Justinian periods.⁶² *Plena in re potestas* is understood to mean that *dominium* confers upon an owner the most extensive powers to decide the use and disposition of the thing owned.⁶³ Other real rights were per definition limited, which creates the idea that ownership was the only right that was absolute in the sense of granting full and complete disposition over the property. However, Cowen's historical analysis is somewhat superficial, and the matter is more complex than it appears. The term occurs in that period but had a much more restrictive meaning than he attributes to it. Cowen's word choice was presumably influenced by later Pandectist developments of the definition and understanding of ownership.⁶⁴ For instance, insofar as *dominium* was recognised in classical Roman law and until the late Middle Ages it was not a uniform right; there was always at least two or three different forms.⁶⁵ Furthermore, the neighbour law principles in Roman law indicate that the notion of *plena in re potestas* was not absolute, meaning that the extensive powers of an owner were limited by the restrictions imposed by law.⁶⁶ What did exist in the Roman sources was the contrasting notions of *dominium plenum* and *dominium minus plenum*, but

⁶² Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 9. See also Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 305-321 305; Schrage EJJH "*Ius in re corporali perfecte disponendi*: Property from Bartolus to the New Dutch Civil Code of 1992" in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 35-67 43.

⁶³ Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 8; Pienaar G "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 295.

⁶⁴ Visser DP "The absoluteness of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 42.

⁶⁵ Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtgeleerd Magazijn Themis* 248-275 259-260.

⁶⁶ Birks P "The Roman law concept of dominium and the idea of absolute ownership" 1985 *Acta Juridica* 1-37 17; Pienaar G "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 298, 307-308.

they only indicated whether the owner was using the property himself or has transferred some entitlements to another person or persons.

In classical Roman law there were already certain developments of *dominium*. It was extended to immovable property, and there was greater emphasis on the individualised nature of ownership, presumably because of the individualisation of Roman society around that time.⁶⁷ However, this should not be equated with the way individualism (as characteristic of ownership) is understood today.⁶⁸ In Roman law there was more than one type of *dominium*,⁶⁹ and there could be more than one owner of a particular thing, thus negating the illusion of uniformity or absoluteness.⁷⁰

One possible explanation as to why the concept of *dominium* was left undefined in Roman law is that the focus of Roman law fell on the possible actions of an owner, such as the *rei vindicatio*.⁷¹ It then made sense to place emphasis on the actions that protected the right,

⁶⁷ Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 259; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 298.

⁶⁸ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 29-31; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 301.

⁶⁹ Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 307. Van der Walt explains that various forms or manifestations of *dominium* can be found in especially classical Roman law. Some examples include *dominium ex iure Quiritium*, *dominium in bonis esse* and ownership for *peregrini* in terms of the *ius gentium*. Also see Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 269-260; Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 137-138.

⁷⁰ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 298; Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 220.

⁷¹ Birks P “The Roman law concept of dominium and the idea of absolute ownership” 1985 *Acta Juridica* 1-37 4; Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 307; Van der Walt AJ & Kleyn DG

rather than on the content of the right.⁷² In post-classical or so-called vulgar Roman law, the sharp distinction that was drawn between *possessio* and *dominium* in classical Roman law was blurred.⁷³ The distinction became less definite because actions were not as important and terminology became less clear and less important than was the case in classic Roman law.⁷⁴

Since there was no formal definition, it is difficult to determine the exact content of the Roman law notion of *dominium*.⁷⁵ The risk arises that a contemporary understanding of ownership can influence how the sources on the matter are interpreted, and in this manner *dominium* can be construed to resemble its modern counterpart.⁷⁶ However, there are both similarities and substantial differences between *dominium* in Roman law and the concept of ownership as it is understood today.⁷⁷ Feenstra expressly warns against superficially equating the two with one another and argues that it is illogical to assume that the institution has remained unchanged and still fulfils the same functions as it did in Roman law.⁷⁸ The

“Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 218-219.

⁷² Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 261; Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 305-321 307; Birks P “The Roman law concept of *dominium* and the idea of absolute ownership” 1985 *Acta Juridica* 1-37 4-5.

⁷³ Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 307; Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 219.

⁷⁴ Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 261.

⁷⁵ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 299.

⁷⁶ Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 257.

⁷⁷ Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 213.

⁷⁸ Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 254; Feenstra R *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht* (5th ed 1990)

important point that this discussion of Roman law makes is that there was no formal, technical definition of *dominium*, although private ownership was known and rules existed to govern the institution. Significantly, the idea of a singular, absolute and individual notion of ownership does not derive from Roman law.⁷⁹

Medieval philosophers also engaged with the notion of *dominium*, but not from a technical, legal perspective and therefore their writings were not always in line with strict legal dogma.⁸⁰ Nonetheless, this does not mean that their views did not have a significant impact on how ownership developed. Thomas Aquinas (1225-1274) addressed the question whether possession of “exterior” things can be regarded as “natural *dominium*” or not.⁸¹ The importance Aquinas placed on the human will or *potestas* is particularly telling because he moves away from viewing ownership as a natural, pre-social right, and emphasises that ownership is subject to human will.⁸² William Occam (1290-1349) continued in this vein, furthering the subjective approach to property and ownership.⁸³

Another important line of development was introduced by the Glossators, who distinguished between two forms of ownership, namely *dominium directum* and *dominium*

35, 38-40. Also see Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 6; Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 306.

⁷⁹ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 41.

⁸⁰ Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 306-325 317.

⁸¹ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 82-83; Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 23.

⁸² Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 37-38; Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 23.

⁸³ Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 23.

utile.⁸⁴ *Dominium directum* (“direct ownership”) contrasted the direct ownership of the landowner with the beneficial use of the vassal, with *dominium directum* and *dominium utile* regarded as different forms of ownership. This fragmentation of ownership (acknowledging more than one form of ownership) can be attributed to various social, political and philosophical factors, most notably the feudal land system.⁸⁵ In the Bolognese law school in the Middle Ages a further distinction was drawn between *dominium utile* and *dominium eminens* (“state ownership”).⁸⁶

A landmark development was the definition penned by Bartolus de Saxoferrato (1313-1357) in the 14th century.⁸⁷ Bartolus defined *dominium* as the most complete or comprehensive control (“perfect control”) that a person could have over a thing, insofar as it is not prohibited by law.⁸⁸ His definition would go on to form the basis of many other

⁸⁴ Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 235. The Glossators’ practice of merely describing what they encountered in (feudal) practice is indicative of one of the shortcomings of focusing on concepts.

⁸⁵ See the discussion by Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 237-241; Schrage EJJH “*Ius in re corporali perfecte disponendi*: Property from Bartolus to the New Dutch Civil Code of 1992” in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 35-67 42.

⁸⁶ Van den Bergh GCJJ *Geleerd recht. Een geschiedenis van de Europese rechtswetenschap in vogelvlucht* (3rd ed 1994) 9-10; Schrage EJJH “*Ius in re corporali perfecte disponendi*: Property from Bartolus to the New Dutch Civil Code of 1992” in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 35-67 42.

⁸⁷ See Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 307; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 301.

⁸⁸ Bartolus on D 41 2 17 1 n 4. The Latin definition reads: *Dominium est ius de re corporali perfecte disponendi nisi lege prohibatur*. As a result of the reference to *re corporali* in the definition, this definition refers only to corporeal property. Bartolus framed a second, more general definition of *dominium*, which includes both corporeal and incorporeal property. See Van der Walt AJ “Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu” (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 309-310.

academic definitions of ownership, most notably the works of other Post-Glossators, the Spanish moral philosophers and the German Pandectists.⁸⁹

Bartolus' definition was interpreted and analysed by several of these schools of thought and influenced the legal developments proposed by each school.⁹⁰ When engaging with Bartolus' definition, much emphasis was placed on the words "*perfecte disponendi*", as a means of establishing authority to favour the absolute nature of ownership. Schrage argues that the term *perfecte disponendi* formed the basis of the "eternal myth of the unlimited, unrestricted and borderless power of the owner to do whatever he pleases".⁹¹ However, academics have since argued convincingly that when the context of the definition and secondary interpretations thereof are considered, Bartolus used the term *perfecte disponendi* merely to differentiate *dominium* from *possessio* and that it was never intended to introduce or support an absolutist view of ownership.⁹² Moreover, one cannot easily ignore his clear qualification that the owner's freedom only extends to that which is not prohibited by law. Finally, Bartolus did not have the intention of placing *dominium* in a privileged position in a hierarchy of rights, because he acknowledged three kinds of *dominium*.⁹³ Bartolus deals with

⁸⁹ See in general Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321.

⁹⁰ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 24; Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 311-313.

⁹¹ Schrage EJH "*Ius in re corporali perfecte disponendi*: Property from Bartolus to the New Dutch Civil Code of 1992" in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 35-67 44.

⁹² Feenstra R *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht* (1990) 37-41; Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 307; Visser DP "The absoluteness of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 43.

⁹³ Van der Walt AJ "Roman law, fundamental and law reform" (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 400-422 417.

three kinds of *dominium*,⁹⁴ namely *dominium directum*, *dominium utile* and *quasi-dominium*; all of which were treated as forms of ownership.⁹⁵ This view of ownership effectively precludes ascribing characteristics such as absoluteness, individuality and uniformity to ownership, and these characteristics are therefore not compatible with Bartolus' definition when viewed in its proper context.⁹⁶

Pursuant to Bartolus' definition, two different views emerged over time, which emphasised Bartolus' distinction between disposition (by the owner) and use (by the possessor).⁹⁷ The emphasis was either placed on the entitlement of an owner to dispose of or alienate the thing, or on the use entitlement.⁹⁸ If the emphasis is placed on the entitlement of disposition and alienation, *dominium directum* is regarded as "true" or effective ownership. The use entitlement is then of lesser importance. This lost its force in the post-feudal "shift" of ownership towards the actual user, presumably because in feudal law the overlords seldom used the land. Accordingly, the other viewpoint which held that *dominium utile* was true or

⁹⁴ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 310. See also Schrage EJH "Ius in re corporali perfecte disponendi: Property from Bartolus to the New Dutch Civil Code of 1992" in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 35-67 44.

⁹⁵ Bartolus on D 21 2 39 1 n 3. For a more detailed discussion see Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 310; Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 21.

⁹⁶ Van der Walt AJ "Roman law, fundamental rights, and law reform" (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 400-422 416; Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 310.

⁹⁷ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 312-314.

⁹⁸ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 311; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 306-325 318; Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 21.

effective ownership and which valued the right to use the property, gained momentum in post-feudal law.⁹⁹

These two views were also influential in the works of the Spanish moral philosophers. The most popular view, under the influence of the writings of Thomas Aquinas, focused on the use entitlement of the owner. The Spanish moral philosophers defined *dominium* as a human *facultas* and the interpretation of Bartolus' reference to *perfecte disponendi* as "free use" was generally accepted.¹⁰⁰ This approach led to greater emphasis on the comprehensiveness of an owner's use entitlement, which contributed to the impression that the owner's power was fundamentally unrestricted.¹⁰¹ Fernando Vazquez de Menchaca (1512-1566), also a Spanish moral philosopher, did not follow the approach of his contemporaries, but sided with the alternative view mentioned above. He took *perfecte disponendi* to refer to the entitlement of an owner to alienate his property, and consequently attached less importance to the use entitlement.¹⁰²

⁹⁹ Van der Walt AJ "Roman law, fundamental rights, and law reform" (1998) 61 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 400-422 416-417; Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 311-313.

¹⁰⁰ Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtgeleerd Magazijn Themis* 248-275 270; Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 313.

¹⁰¹ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 313.

¹⁰² Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 313-314; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 306-325 317; Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 109-110.

Both of these interpretations enjoyed a certain amount of support in legal thinking at various times and initially there was no clear preference for one above the other.¹⁰³ However, from the 17th century onward there was a shift toward a preference for the approach that emphasises the owner's absolute or unlimited use entitlement.¹⁰⁴

Similarly, in Roman-Dutch law ownership was defined with emphasis on the use entitlement, rather than the entitlement of alienation. However, Grotius' contribution to the development of the ownership concept was extremely influential.¹⁰⁵ He was the first Roman-Dutch jurist to expressly distinguish between *dominium plenum* ("full ownership") and *dominium minus plenum* ("limited ownership").¹⁰⁶ He argues that full ownership is restricted or diminished by the creation of limited real rights in the thing owned.¹⁰⁷ His distinction between ownership and limited real rights on the basis of the greater value of ownership marked the movement away from the medieval concept of divided ownership. Instead, Grotius associated ownership with the complete or residual right, and limited real rights with individual (use) entitlements separated from ownership and transferred to others.¹⁰⁸ Grotius's formulation of the principle of *dominium plenum* implicitly viewed this form of ownership as

¹⁰³ Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtgeleerd Magazijn Themis* 248-275 269-270; Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 314.

¹⁰⁴ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 314.

¹⁰⁵ Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtgeleerd Magazijn Themis* 248-275 271;

¹⁰⁶ Grotius 2.3.9-2.3.11, 2.33.1. The distinction between ownership with use and ownership without use stems from classic Roman law. See Van der Merwe CG *Sakereg* (2nd ed 1989) 171.

¹⁰⁷ Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 569-589 583.

¹⁰⁸ Van der Walt AJ "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 19.

the pre-eminent right over property.¹⁰⁹ His work therefore presented a subtle shift in thinking, away from the medieval notions of *dominium directum* and *dominium utile* as two forms of ownership and toward a hierarchical view of full ownership and limited real rights.¹¹⁰ According to Milton, this aspect of Grotius's work was particularly influential at the time that Jan van Riebeeck travelled to South Africa, and was introduced as part of Roman-Dutch law at that time.¹¹¹

The French Revolution and the accompanying abolition of the feudal system of land rights had a profound impact on the conceptualisation of ownership.¹¹² In fact, the French Revolution and the rise of liberalism are often regarded as the main reasons for the development of the absolutist view of property. The view of ownership as a “*droit inviolable et sacré*” became increasingly popular and, with the movement toward political and economic freedom, state interference was regarded as a limitation of liberty and was subject to greater scrutiny than ever before.¹¹³ With the rise of capitalism, there was a keen interest in and fierce protection of private ownership. Although the Revolution and subsequent political and social climate did have an impact on property's role and function in society, Feenstra argues that the Revolution and liberalism played a smaller and less significant role in the

¹⁰⁹ Milton JRL “Ownership” in Zimmermann R & Visser D (eds) *Southern cross. Civil law and common law in South Africa* (1996) 657-699 559.

¹¹⁰ Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 272; Visser DP “The absoluteness of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39-52 41; Van der Walt AJ “Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 20-22.

¹¹¹ Milton JRL “Ownership” in Zimmermann R & Visser D (eds) *Southern cross. Civil law and common law in South Africa* (1996) 657-699 659.

¹¹² Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 51.

¹¹³ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 3, 52; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 301.

development of the absolutist, individualised view of ownership than the German Pandectists, and that the Revolution's effects should not be overemphasised or distorted.¹¹⁴ On the assumption that Pandectism indeed played a significant part in the development of the absolutist approach, the influence of Pandectism is discussed separately below.

An interesting line of development to consider is the justification for the institution of private property and its role in society after the rise of the modern state. The work of John Locke (1632-1704) was particularly influential in this regard. Locke's primary contribution to the development of the concept of ownership was his natural law justification for private property. In his most influential work, *Two Treatises of Government*, Locke synthesises natural law with the theory of individual rights and argues that there are three inalienable or natural rights, namely life, liberty and property.¹¹⁵ The natural rights theory of property developed by Locke provided an influential directive to establish the legitimate scope of property rights.¹¹⁶

Locke's theory is premised on the idea of a "state of nature" where natural resources are God-given to humanity. When an individual "mixes" his labour with something of the common, the property becomes exclusively his.¹¹⁷ However, reference to individualism in Locke's work should not be equated with individualism as it is understood in private law

¹¹⁴ Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtgeleerd Magazijn Themis* 248-275 256.

¹¹⁵ Locke J "Of property" in Macpherson CB (ed) *Property: Mainstream and critical positions* (1992) 17-30 17-18. See Le Roux WB "Natural law theories" in Roederer C & Moellendorf D (eds) *Jurisprudence* (2007) 25-61 43; Bien J "Freedom and the concept of property in John Locke's Second Treatise of Government" (1977) 10 *Archiv für Rechts und Sozialphilosophie* 189-194.

¹¹⁶ Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 50.

¹¹⁷ Locke J "Of property" in Macpherson CB (ed) *Property: Mainstream and critical positions* (1992) 17-30 19-20. See Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 100-105 for a brief overview of Locke's work in specifically the context of developing an absolutist view of property.

doctrine today and Locke's *Second Treatise* is not necessarily a defence of individual or absolute rights to property.¹¹⁸ Locke attached important conditions to ownership of private property, most notably that the mixing of labour-theory can only apply when there is adequate property of equal quality available to others.¹¹⁹ However, a specific reading of certain parts of Locke's work supported a liberal economic approach and these aspects were emphasised in classic liberalism.¹²⁰

In the next section, the institution of private property is briefly discussed in the context of Anglo-American common law. The discussion shows that despite property's unique origin, terminology and development in the common law, many similar assumptions exist regarding its role and function in society, in both common law and civil law.¹²¹ These brief remarks emphasise the universality of issues relating to ownership, limitations and the rights paradigm and makes property theory from common law jurisdictions both interesting and relevant for South African law.

¹¹⁸ Stevens J "The reasonableness of John Locke's majority: Property rights, consent, and resistance in the Second Treatise" (1996) 24 *Political Theory* 423-463 426-427. Also see the discussion on Locke by Walsh R *Private property rights in the Irish Constitution* (2011) 9-13.

¹¹⁹ Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 38. Also see Gray K "Property in thin air" (1991) 50 *Cambridge Law Journal* 252-307 293 who argues that Locke's focus on original acquisition is ill-suited to justify the institution of private property in the modern context which is primarily based on derivative acquisition.

¹²⁰ Stevens J "The reasonableness of John Locke's majority: Property rights, consent, and resistance in the Second Treatise" (1996) 24 *Political Theory* 423-463 427. See also Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 38.

¹²¹ Van der Walt AJ *Property in the margins* (2009) 30-31.

2 3 3 A brief note on the notion of absoluteness in common law

Anglo-American common law does not have a general formulation or definition of “anything resembling a comprehensive or holistic theory of *dominium* in the continental sense,”¹²² but the institution of private ownership is part of the common law legal system and therefore, despite variances in terminology, many problems regarding regulation and the absoluteness of “ownership” or, more generally, property rights, that arise in civil law also arise in common law.¹²³ Specifically, the issue of absolutism of property is also problematic in common law, although it is based on a completely different line of development, since German Pandectism (a major influence in the development of the absolutist view in civil law) did not influence the development of common law.

The rise of absolutism in common law is attributed to a specific reading of Blackstone’s *Commentaries on the Laws of England*.¹²⁴ In particular, Blackstone’s description of property as “sole and despotic dominium” often forms the basis of the argument that property is exclusive and grants free disposition.¹²⁵ However, as Rose argues, when Blackstone’s description is read in context, it seems at least questionable whether he intended the definition literally or technically, in the way that has been ascribed to the specific passage.¹²⁶

¹²² Gray K & Gray SF “The idea of property in land” in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 15-51 35.

¹²³ Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 108.

¹²⁴ See Rose CM “Canons of property talk, or, Blackstone’s anxiety” (1998) 108 *Yale Law Journal* 601-632 601-603.

¹²⁵ Rose CM “Canons of property talk, or, Blackstone’s anxiety” (1998) 108 *Yale Law Journal* 601-632 601; Alexander GS “Critical land law” in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 52-78 55-56; Van der Walt AJ *Property in the margins* (2009) 36.

¹²⁶ Rose CM “Canons of property talk, or, Blackstone’s anxiety” (1998) 108 *Yale Law Journal* 601-632 602 explains that Blackstone characterised property as exclusive in response to medieval and feudal law traditions. Also see Schorr DB “How Blackstone became a Blackstonian” (2009) 10 *Theoretical Inquiries in Law* 103-126 116; Waring E *Aspects of property: The impact of private takings* (2009) 35; Grey TC “The disintegration of property” in Pennock JR & Chapman JW (eds) *Property* (1980) 69-85 73-74.

Despite the strong formulation, the context of the rest of Blackstone's exposition of property shows that he was aware that this definition did not correspond with the institution of private property found in English law at that time.¹²⁷ Blackstone's definition was particularly influential in early Anglo-American law, and eventually found its way into American case law and legal theory.¹²⁸ However, Blackstone's work in itself cannot be seen as clear authority for absolutism.

Despite the doctrinal and historical differences between common law and civil law, the notion of absolutism exists in both traditions. Academics have attributed the existence of a similar notion of absoluteness in common law and civil law to the influence of economic and political liberalism.¹²⁹ In 17th century England, property was primarily regarded as "an embodiment of local political sovereignty."¹³⁰ The economic implications of private property were subject to its political importance. However, there was a shift from political freedom to economic liberty in property discourse after the 17th century, which meant that property was increasingly understood in terms of its guarantee of economic liberty alone; a view that edged

¹²⁷ According to Schorr, no English case has ever cited Blackstone as authority for "sole and despotic dominion". See Schorr DB "How Blackstone became a Blackstonian" (2009) 10 *Theoretical Inquiries in Law* 103-126 104, 114, 119 footnote 104.

¹²⁸ Schorr DB "How Blackstone became a Blackstonian" (2009) 10 *Theoretical Inquiries in Law* 103-126 119-124; Burns RP "Blackstone's theory of 'absolute' rights of property" (1985) 54 *Cincinnati Law Review* 67-86 68.

¹²⁹ Van der Walt JWG "The critique of subjectivism and its implications for property law: Towards a deconstructive Republican theory of property" in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 115-159 115-119 explains that there are two property paradigms: property as private law (economic) right and property as a constitutional (political) right. Also see Van der Walt AJ *Property in the margins* (2009) 37.

¹³⁰ Van der Walt JWG "The critique of subjectivism and its implications for property law: Towards a deconstructive Republican theory of property" in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 115-159 118.

to the forefront in the 19th century.¹³¹ Property as political freedom became less important in the face of economic liberalism as a social system.¹³²

The liberal individualist conception of property as an economic right is still influential in common law. The view of property as an individual, absolute right that is in principle free from limitations is just as problematic in common law as in civil law, and has elicited many of the same points of criticism.¹³³ For instance, Gray and Gray argue that the law fluctuates between three perspectives regarding property in common law jurisprudence. Doctrinal uncertainty exists because it is unresolved whether property should be understood as “empirical facts, artificially defined rights, or duty-laden allocations of social utility.”¹³⁴ The three perspectives represent three models of property, namely property as a fact (the behavioural aspect), property as a right (the conceptual aspect) and property as a responsibility (the obligational aspect).

According to Gray and Gray, this is indicative of “deep structural indeterminacy”, which simultaneously explains some of property law’s quintessential problems, and prohibits the development of effective and innovative solutions to these problems.¹³⁵ All three perspectives can be useful at times and will overlap and interact to some extent, but “the idea

¹³¹ Alexander GS *Commodity and propriety: Competing visions of property in American legal thought 1776-1970* (1997) 248-254.

¹³² Van der Walt JWG “The critique of subjectivism and its implications for property law: Towards a deconstructive Republican theory of property” in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 115-159 119 points out that by the time the American Constitution was written, the right to property was predominantly understood as an economic right and not a political right.

¹³³ Rose CM “Canons of property talk, or, Blackstone’s anxiety” (1998) 108 *Yale Law Journal* 601-632 612-614; Schorr DB “How Blackstone became a Blackstonian” (2009) 10 *Theoretical Inquiries in Law* 103-126 126.

¹³⁴ Gray K & Gray SF “The idea of property in land” in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 15-51 18.

¹³⁵ Gray K & Gray SF “The idea of property in land” in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 15-51 18.

of property ... oscillates ambivalently” between these three models.¹³⁶ Thus, in common law, as much as in civil law doctrine, the role and function of context, obligation and the public interest in property law is not clear. The “property as a right” model corresponds with civil law conceptualism and makes it possible to view property as an abstract, exclusive, individual and absolute right that resembles the notion of absolutism in civil law that developed under the influence of Pandectism.

2 3 4 *The influence of Pandectist thought*

The definition of the ownership concept that exhibits the characteristics of absolutism and individualism most explicitly can be linked to several historical factors, *inter alia* the scientification of the law by the German Pandectists.¹³⁷ The creation of a more structured (hierarchical) and formal property law system greatly influenced early South African private law doctrine and legal thinking in general.¹³⁸ Pandectist thinking has been influential in the scientification of the legal system as well as the “*verabsolutering van eigendom*”, in the sense that Pandectists accepted and developed a fundamentally absolute conceptualisation of ownership.¹³⁹

¹³⁶ Gray K & Gray SF “The idea of property in land” in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 15-51 18.

¹³⁷ Other significant historical events were already mentioned. A few examples include the French Revolution and subsequent abolition of the feudal system, the rise of capitalism, the influence of German Idealism and the greater emphasis placed on civil, political and economic freedom. See in general Van der Walt AJ & Kleyn DG “*Duplex dominium*: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 247-248; Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 2-3, 66 for a discussion of the scientific approach of the Pandectists.

¹³⁸ Carey Miller DL & Pope A *Land title in South Africa* (2007) 15; Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 434.

¹³⁹ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 2-3, 66; Van den Bergh GCJJ *Geleerd recht. Een geschiedenis van de Europese rechtswetenschap in vogelvlucht* (3rd ed

An interpretation of Bartolus' definition of ownership was widely accepted in 19th century Europe, but in a form that was foreign to Bartolus. This is seen most clearly in the work of Georg Friedrich Puchta (1798-1846) and Bernhard Windscheid (1817-1892).¹⁴⁰ The Pandectists claim that their ideas are a revival of classic Roman law, but insofar as the Pandectists refer to ownership as a singular, uniform, individual, abstract and absolute right, it is not readily reconcilable with either Roman law or Bartolus' original definition.¹⁴¹

Puchta, for example, describes ownership as the complete or absolute legal submission of a thing to the human will.¹⁴² This approach emphasises the extent of the owner's use entitlement, namely that it was almost unlimited or absolute in principle.¹⁴³ Puchta's work also gives a new element to the definition of ownership, namely that it is described as the totality of the owner's entitlements. The focus still falls on the extent of the owner's use entitlement, but it is now approached from a slightly different angle.¹⁴⁴

1994) 10-11. According to Van den Bergh this process took place between 1830 and 1880. The reaction to this development can be seen in legislation promulgated especially in the period between 1900 and 1960 in the Netherlands. Also see Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross. Civil law and common law in South Africa* (1996) 657-699 694.

¹⁴⁰ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 314.

¹⁴¹ Van der Walt AJ & Kleyn DG "*Duplex dominium*: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 248; Cloete R *Onstoflike sake in die nuwe Suid-Afrikaanse sakereg* (2001) 48-52, 59.

¹⁴² Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 315; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 306-325 323. Van der Walt explains that Puchta was greatly influenced by the works of German philosophers Hegel and Kant.

¹⁴³ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 315; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 306-325 324.

¹⁴⁴ Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 315.

Similarly, Windscheid defines ownership with reference to subjective rights and the assumption that rights are enforced through human will.¹⁴⁵ If the right allows the holder to exert her will over the object “in the totality of its relations”, it is ownership. If the entitlement only allows one to exercise one’s will with reference to a specific relation or group, it is a limited real right.¹⁴⁶ A legal system will issue a principle which allows certain actions, and this principle is granted to a person “for free disposal”. An owner is at liberty to exercise her will to decide whether or not to enforce her freedom.¹⁴⁷ Furthermore, Windscheid distinguishes between real rights and personal rights, since the role of human will is decisive for a thing in terms of a real right, whereas with a personal right a person’s will is decisive for the actions of a specific person.¹⁴⁸ This implies that an owner is at liberty to decide over the actions of “the world at large” with regard to the thing he owns. In terms of this construction, the right to exclude all others from interfering with the rights of the owners is central to the ownership concept; as is the notion that although an owner’s rights can be limited, limitations or restrictions cannot affect the fundamental nature of ownership.¹⁴⁹

¹⁴⁵ Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 572; Van der Walt AJ “Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 22.

¹⁴⁶ Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 574.

¹⁴⁷ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 80; Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 572.

¹⁴⁸ Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 572; Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 306-325 322.

¹⁴⁹ Visser DP “The absoluteness of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39-52 47; Van der Walt AJ “Ownership and personal freedom: Subjectivism in Bernhard Windscheid’s theory of ownership” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 573; Van der Walt

The notion that ownership is the exercise of individual freedom not only over a thing, but also *vis-à-vis* other persons, reinforces the idea that there is a special bond between property and liberty.¹⁵⁰ Windscheid engaged with the liberal trend in the social-political environment and was influenced by the reigning philosophical and political views of his time, although classic Roman law was said to be the basis of the Pandectists' argument in favour of absolute and exclusive ownership.¹⁵¹

The idea of the supremacy of the human will featured strongly in the works of the moral philosopher, Immanuel Kant (1724-1804). There are significant areas of overlap between the work of Windscheid and Kant and Windscheid was influenced by Kant's ideas. Noteworthy is the emphasis both writers placed on ownership not only as rights over a thing, but also as establishing the parameters of relationships between individuals. A significant aspect of Pandectist thinking about ownership and its relationship with expressions of the human will is the fact that the liberty that is guaranteed by ascribing absoluteness or the absence of external limitations to ownership is regarded as an important guarantee of the freedom or space that is required for unfolding or development of the human personality.¹⁵²

AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 306-325 323.

¹⁵⁰ Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 581; Van der Walt AJ "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 23.

¹⁵¹ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofiese opmerkingen over eigendom in huidige en komend recht* (1987) 22; Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 585.

¹⁵² Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 569-589 587. See Van der Walt AJ "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 23 where it is explained that the close link between property

The social, political and philosophical context of the 19th century was conducive to the development of conceptual formalism that regarded ownership as a universal right with standard characteristics that were politically and philosophically “neutral”. Under the influence of Pandectism, the concept of ownership was moulded to reflect the views of the reigning ideology, namely that ownership is individualistic, abstract and absolute, leaving an owner free to do with his property as he pleases, while merely tolerating external interferences.¹⁵³

Wolff developed the Pandectist view of ownership even further in the 20th century to explain the relationship between individual ownership and the public interest, and his theory was relied on, in certain private law circles, to explain the relationship between the first part of article 14.1 of the German Basic Law and the limitations placed on ownership in the second part of article 14.1 and article 14.2.¹⁵⁴ Wolff’s theory was widely accepted at the time.¹⁵⁵ According to Wolff, ownership is the unlimited right to use one’s property as you see fit, while exceptional limitations and restrictions are imposed by the state to protect the interests of weaker citizens and to promote and protect social order.¹⁵⁶ This theory reflects the Pandectist ideal, namely that ownership is a universal and abstract right that remains fundamentally unaffected by the temporary or exceptional limitations that might be imposed

and individual freedom and moral autonomy results in the creation of a “private legal space, created and protected by law”.

¹⁵³ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 28-29; Cloete R *Onstoflike sake in die nuwe Suid-Afrikaanse sakereg* (2001) 48-52, 59.

¹⁵⁴ Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 441.

¹⁵⁵ Wolff M “Reichsverfassung und Eigentum” in *Festschrift für Wilhelm Kahl* (1923) 3-30 3ff. Also see Weber RH “Eigentum als Rechtsinstitut. Beurteilungsstand und Entwicklungstendenzen” (1978) 97 *Zeitschrift für Schweizerisches Recht* 161-191 170.

¹⁵⁶ Wolff M “Reichsverfassung und Eigentum” in *Festschrift für Wilhelm Kahl* (1923) 3-30 3ff; Van der Walt AJ “Property rights, land rights, and environmental rights” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism. The new South African legal order* (1994) 455-501 470.

on an otherwise absolute and unlimited right.¹⁵⁷ While the necessity of regulatory limitation of ownership is recognised, it remained clear that such interferences were exceptional and thus to be limited to instances where they were unavoidable.

2.3.5 *The Immanenztheorie*

In response to the absolutist view of ownership, the so-called *Immanenztheorie* was developed in German constitutional law, in terms of which at least some limitations are inherent or immanent to ownership. The *Immanenztheorie* was offered as an alternative explanation of how ownership is viewed in terms of article 14 of the Grundgesetz of 1949. According to the *Immanenztheorie*, ownership is inherently restricted or limited by the second part of article 14(1) and article 14(2); proponents of the *Immanenztheorie* argued that it was factually inaccurate and morally misleading to regard ownership as fundamentally absolute or unlimited.¹⁵⁸ Another “version” of the *Immanenztheorie* was offered by proponents of *Funktionseigentum*, in terms of which ownership is inherently or immanently limited by the function or nature of a particular type of property.¹⁵⁹

In terms of the now widely accepted *Immanenztheorie* in the constitutional context, Blaauw-Wolf and Wolf assert that if fundamental rights are not explicitly limited it is presumed that their limits are set by the immanent norms of the right itself.¹⁶⁰ Van der Walt argues that it is not clear whether property falls into the category of rights that are restricted

¹⁵⁷ Weber RH “Eigentum als Rechtsinstitut. Beurteilungsstand und Entwicklungstendenzen” (1978) 97 *Zeitschrift für Schweizerisches Recht* 161-191 171.

¹⁵⁸ Van der Walt AJ “Property rights, land rights, and environmental rights” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism. The new South African legal order* (1994) 455-501 471.

¹⁵⁹ *Funktionseigentum* is discussed briefly in section 2.3.7 below.

¹⁶⁰ Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) 113 *South African Law Journal* 267-296 271, 275.

by their own immanent limitations and states that it will depend on whether or not one accepts the theory of inherent limitations of property.¹⁶¹

The theory of inherent limitations of property rights is supported by the argument that article 14 establishes that the content and limits of property are determined by law, that the use of property should serve the public interest, and finally, that property may legitimately be expropriated in the public interest. Van der Walt indicates that the counterargument is that property is not limited by the immanent limits of the right itself, but is limited or restricted by or pursuant to a law of general application. Arguably, the limits of property are thus determined by legislation (law of general application), in terms of the constitutional provision, and not by the provision itself.¹⁶²

Van der Walt concludes that the most accurate position regarding the theory of inherent limitations is to say that at least some limitations are inherent to property. These inherent limitations derive directly from the property clause or the Constitution. However, article 14 explicitly states that the limits and content of property has to be determined with reference to standing law. The nature and extent of the majority of limitations are not evident from article 14; they appear from law (both private and public) as it stands at a given point. Furthermore, there are many other limitations that are imposed by legislation in a constitutionally valid manner.¹⁶³ All limitations and their effects are subject to the proportionality principle and the constitutional validity of limitations can be tested, regardless of whether or not the limitation is said to be inherent.¹⁶⁴ The important point at this stage is that the *Immanenztheorie* is part of the larger theoretical framework of constitutionalism, which represents a reaction against private law doctrine on a larger scale and is addressed in more detail in Chapter 3.

¹⁶¹ See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 159.

¹⁶² Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 159.

¹⁶³ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 159.

¹⁶⁴ This point is taken up in Chapter 3.

2 3 6 *Marx's view of ownership and its function in society*

A thematic discussion of ownership should at least briefly consider the fundamentally different direction for the development of private ownership that was introduced by Karl Marx (1818-1883). A comprehensive discussion of Marx's ideas is not necessary in light of the objectives of this chapter and therefore the focus will be restricted to one theme, namely his radically different view of property's role in society. Marx's approach illustrates the point that the role of property and ownership is not self-evident or fixed, but defined by various social, political, economic and ideological factors.

"Ownership" is not expressly defined in Marx's work, mainly because in the type of society Marx envisions, it is not important to determine who the owner of property is, but rather who is entitled to use property.¹⁶⁵ Furthermore, Marx is critical of the language of "rights", since it involves a perpetuation of the notion of rights as trump cards over the interests of others or the community.¹⁶⁶ Marx envisions a society where reliance on "rights" is unnecessary.

Marx places private property central to the discussion regarding economic and social relations.¹⁶⁷ According to Marx, private property is the "antithesis to social, collective property"¹⁶⁸ and therefore he advocates the abolition of (modern, bourgeois) private property and states that all land and means of production must be "collectivised or communalised" for

¹⁶⁵ Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 16-35 32; Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historiese en politiek-filosofiese opmerkingen over eigendom in huidige en komende recht* (1987) 123.

¹⁶⁶ Moellendorf D "Marxism and the law" in Roederer C & Moellendorf D (eds) *Jurisprudence* (2007) 138-157 144.

¹⁶⁷ Pienaar G "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 304.

¹⁶⁸ Marx K *Capital. An abridged edition* (2008; transl by Moore S & Aveling E, 1887) 378.

the benefit of the community.¹⁶⁹ When land and the means of production are privately owned, it affords the opportunity to transform individual property to bourgeois property or capital through the exploitation of others, thereby creating an unequal and classist society.¹⁷⁰

Moreover, Marx argues that communism does not deprive a person of the opportunity to “appropriate the products of society”; instead it serves to curtail the power of individuals to exploit the labour of others for personal gain.¹⁷¹ This approach leads to a distinction between several categories of ownership.¹⁷² Firstly, private ownership of consumer goods is allowed (so-called “personal ownership”), provided that it is not profit-generating, in which case it becomes a means of production. The second category is socialist ownership of land and the means of production. This category is further divided into state ownership (primarily pertaining to land) and collective ownership (primarily pertaining to means of production). In the case of collective ownership there is no free or absolute power of disposition of the entitlements of the thing owned; its use is subject to stringent limitations imposed by the state.¹⁷³

In light of the preceding discussion of the influence of Pandectism and the accompanying emphasis on individual autonomy and freedom, it is interesting to note the role that

¹⁶⁹ Marx K “The communist manifesto” in Macpherson CB (ed) *Property: Mainstream and critical positions* (1992) 61-64 62.

¹⁷⁰ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 304.

¹⁷¹ Marx K “The communist manifesto” in Macpherson CB (ed) *Property: Mainstream and critical positions* (1992) 61-64 63.

¹⁷² Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historiese en politiek-filosofiese opmerkingen over eigendom in huidige en komend recht* (1987) 123; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 304.

¹⁷³ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historiese en politiek-filosofiese opmerkingen over eigendom in huidige en komend recht* (1987) 136; Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 304; Van der Walt AJ “Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip” (1988) 21 *De Jure* 16-35 31.

individualism and freedom plays in Marx's work. He views private property as an institution that suppresses or undermines individuality.¹⁷⁴ Marx states that private property induces individuals to view others as potential threats to their freedom, in the form of placing limitations on their otherwise absolute freedom,¹⁷⁵ and argues that true freedom can only be achieved in cooperation and association with others.¹⁷⁶ Therefore he is critical not only of the disregard for the interests of others that capitalism fosters, but also of the very fact that such a severance between members of a community and their interests is allowed to occur at all.

This criticism illustrates the point of Marx's argument that the institution of private property is inherently incompatible with the ideal form of community. Moreover, a system that allows for private property creates relations that pit the interests of owners against the interests of non-owners and induces both parties to view the other's interest as "alien and hostile".¹⁷⁷ This results in different classes of individuals who feel the need to protect their interests against others.¹⁷⁸ Marx argues that such an environment is not conducive to human freedom, and even property earned through own labour can at best contribute to a very

¹⁷⁴ Stillman PG "Property, freedom, and individuality in Hegel's and Marx's political thought" in Pennock JT & Chapman JW (eds) *Property* (1980) 130-167 130.

¹⁷⁵ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 125.

¹⁷⁶ Brenkert GG "Freedom and private property in Marx" in Cohen M, Nagel T & Scanlon T (eds) *Marx, justice and history* (1980) 80-105 82-84.

¹⁷⁷ Brenkert GG "Freedom and private property in Marx" in Cohen M, Nagel T & Scanlon T (eds) *Marx, justice and history* (1980) 80-105 83.

¹⁷⁸ Brenkert GG "Freedom and private property in Marx" in Cohen M, Nagel T & Scanlon T (eds) *Marx, justice and history* (1980) 80-105 83-84.

limited development of individuality.¹⁷⁹ His conclusion is that true freedom can best be achieved when an individual is part of a classless community with harmonised interests.¹⁸⁰

A cursory glance at ownership in a socialist context creates the impression that the concept of ownership departs quite drastically from its liberal Pandectist counterpart that is known for its exclusivity, abstractness and absoluteness. Ownership cannot be characterised as absolute in a socialist or communist society, since it is subject to the overpowering social function of property.¹⁸¹ Recently, some of Marx's ideas are being taken up again, albeit in a different context, since it is no longer a case of pitting socialism or communism against capitalism. Instead, it represents another reaction against private-law absolutism, like many other attempts to break free of the individual ownership paradigm.¹⁸²

2 3 7 *The functionalist approach: The Dutch reaction to absolutism*

In terms of property law doctrine, it is necessary to establish whether all types of property are treated equally, especially insofar as the regulation of property is concerned. It is an open question whether it is sound to "regard ownership as a concept having the same uniform meaning, regardless of the nature of the particular object or thing owned".¹⁸³ The role of the

¹⁷⁹ Stillman PG "Property, freedom, and individuality in Hegel's and Marx's political thought" in Pennock JT & Chapman JW (eds) *Property* (1980) 130-167 131.

¹⁸⁰ Stillman PG "Property, freedom, and individuality in Hegel's and Marx's political thought" in Pennock JT & Chapman JW (eds) *Property* (1980) 130-167 131.

¹⁸¹ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 136; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 16-35 32.

¹⁸² There are traces of Marxist thinking in the Dutch functionalist approach and in the progressive property movement. Dutch functionalism is discussed below. Selected works of progressive property scholars are discussed in Chapter 5.

¹⁸³ Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 7.

nature of property is explored briefly as part of the discussion of the Dutch functionalist approach.

The Dutch functionalists recognised the need to make ownership socially responsive and tried to bring about certain developments within private law at the time the *Burgerlijk Wetboek* was being redrafted. Their focus on private law stems from the fact that there is no constitutionally entrenched property clause in the Dutch Constitution. Dutch functionalism represents a reaction against the absolute and abstract nature of property in private law and is an attempt to “subject the private law traditions to social control.”¹⁸⁴

The functionalists’ concern with the definition of ownership in modern Dutch law provides an interesting example of the reaction against the abstract, absolute and individualist conceptualisation of ownership that was popular in most Western European countries at that time.¹⁸⁵ The movement attempted to reintroduce the social function of property by creating a so-called pluriform concept of ownership.¹⁸⁶ This meant that although the functionalist approach was supposed to be a challenge to the existing private law tradition, it remained squarely within the framework of conceptualism.¹⁸⁷

¹⁸⁴ Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 545.

¹⁸⁵ Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 534.

¹⁸⁶ Slagter WJ “Eigendom en privaatrecht” 1976 *Rechtsgeleerd Magazijn Themis* 276-315 279-280.

¹⁸⁷ Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber amicorum John Gilissen* (1983) 399, 402-403; Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 544.

After World War II the emphasis on the social role that property plays increased,¹⁸⁸ but the traditional conceptual approach to ownership and hierarchical rights paradigm did not leave much room for developing a more “socialised” version of ownership.¹⁸⁹ Because of the different social circumstances after the War, Dutch functionalists argued that the nature of ownership ought to be scrutinised and re-evaluated. The argument was premised on the belief that the 19th century ownership concept was unable to meet the needs of the post-war Netherlands, where importance was increasingly attached to the common interest and less emphasis was placed on the absolute and individual character of ownership.¹⁹⁰ This issue was debated extensively in the 1970s and 1980s, with different suggestions put forward on how the concept of ownership could be developed to adequately reflect the different social and political environment.¹⁹¹

The functionalist approach sought to remedy the shortcomings of the absolutist view of ownership in private law doctrine by arguing that contextual changes affect the very nature of

¹⁸⁸ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 28; Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 535.

¹⁸⁹ Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404 401-402; Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 535.

¹⁹⁰ Slagter WJ “Eigendom en privaatrecht” 1976 *Rechtsgeleerd Magazijn Themis* 276-315 282; Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber amicorum John Gilissen* (1983) 393-395; Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 536-537.

¹⁹¹ Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404; Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 7-17, 154-157; Valkhoff J *Een eeuw rechtsontwikkeling. De vermaatschappelijking van het Nederlandse privaatrecht sinds de codificatie (1838)* (2nd ed 1988) 44.

property rights, and therefore reform of ownership itself is necessary.¹⁹² A possible solution was to amend the uniform character of ownership to provide for a more nuanced definition that acknowledges the differentiation between various types of property (the objects of ownership).¹⁹³

Van Maanen's justification for a pluriform or functionally divided concept of ownership is two-fold.¹⁹⁴ Firstly, he argues that there is already such a differentiation in practice since different types of property are treated differently, at least to some extent. Legal recognition of this factual situation would lead to enhanced legal clarity. Secondly, Van Maanen argues that a pluriform ownership concept creates space for legal reform and development. By recognising three different types of ownership, defined with reference to the object of ownership, a platform for the recognition of community interests is created.¹⁹⁵

¹⁹² Van der Walt AJ "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 25. See in general Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historiese en politiek-filosofiese opmerkingen over eigendom in huidig en komend recht* (1987); Valkhoff J *Vermaatschappelyk vermogensrecht in het nieuwe BW* (1967).

¹⁹³ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historiese en politiek-filosofiese opmerkingen over eigendom in huidig en komend recht* (1987) 151; Erasmus J "Striving towards social responsiveness in private property law: The Dutch functionalist approach" (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 537.

¹⁹⁴ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historiese en politiek-filosofiese opmerkingen over eigendom in huidig en komend recht* (1987) 154.

¹⁹⁵ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historiese en politiek-filosofiese opmerkingen over eigendom in huidig en komend recht* (1987) 157. The three types of ownership are social ownership ("maatschappelijke eigendom"), ownership of property for housing purposes/housing ownership ("wooneigendom") and personal property ("persoonlijk eigendom"). Social property includes *inter alia* land, means of production and communication and water. In this category of social ownership the community interest is particularly strong and ownership will be subject to the public interest. Property owned for housing purposes will be subject to the limits of the law, and Van Maanen proposes a fair or equitable division of "living space". Personal property is defined as the category of things owned to satisfy "material and cultural needs". This category will closely resemble the traditional ownership concept since it will be unlimited in principle and therefore exhibit the characteristics of individualism and absoluteness to a greater degree than the other two forms of ownership.

The pluriform concept of ownership did not find favour with the drafters of the *Nieuwe Burgerlijk Wetboek* (“NBW”) and the “new definition” of ownership in section 5:1:1 was a restatement of the traditional position, with certain technical improvements.¹⁹⁶ The decision not to redefine ownership as a pluriform concept was not condemned by all. Van den Bergh, for example, is of the opinion that there is inadequate historical support for such a development, and that changed societal circumstances do not justify such a radical department from Bartolus’ definition.¹⁹⁷ Moreover, Van den Bergh argued that Bartolus’ definition, properly understood, was wide and flexible enough to adapt to the demands of society.¹⁹⁸

A second proposition for development of the ownership concept involved a balancing or weighing up of the interests of parties concerned.¹⁹⁹ Van Maanen argues that the balancing of interests can be implemented fruitfully when dealing with unlawful occupants (“*onrechtmatige krakers*”), since the balancing of interests can ensure the equitable treatment of the unlawful occupant, without disregarding the interests of the owner. The result, according to Van Maanen, is a more socially responsible ownership concept.²⁰⁰

¹⁹⁶ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 67; Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 543.

¹⁹⁷ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 66-67. See also in general Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404.

¹⁹⁸ Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404 399-400; Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 68.

¹⁹⁹ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 82. See also Van Maanen GE “Kraken als onrechtmatige daad, of de grensoverschrijdende spekulant” 1981 *Recht en Kritiek* 5-17 16;

²⁰⁰ Van Maanen GE “Kraken als onrechtmatige daad, of de grensoverschrijdende spekulant” 1981 *Recht en Kritiek* 5-17 16.

The question was whether the limited balancing of interests that was possible in terms of the law should be expanded, and also whether it had the effect of changing the institution of ownership by awarding a reflexive right to the beneficiaries. The answer was negative, which is why Van den Bergh argued that nothing had really changed.²⁰¹ Amendments to the *Burgerlijk Wetboek* with regard to property were “cosmetic” at best, since the new clause did not include either a social obligation or a pluriform concept of ownership.²⁰² If a type of social obligation to balance private and public interests were to be included in the definition of ownership, it would have to be effected by legislation, which neatly remains within the framework of Bartolus’ definition and qualification of ownership.²⁰³ This means that even if such a reflexive right was attached to ownership through legislation, it would not change the institution of ownership. However, Van den Bergh is critical of relying on the public interest to justify the imposition of a burden on an owner. He argues that an owner should not have to consider the interests of the community when acting within the confines or limits as set out by the law and there is insufficient historical evidence to argue that such an obligation ever existed.²⁰⁴

Ultimately, as a result of increased social consciousness, ownership was subjected to greater legislative and administrative regulation than was the case in the 19th century. Some of the changes to the institution of private property that the functionalists advocated for did happen, but it did not come from changes in private law doctrine. Instead, it came from

²⁰¹ Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404 399-401.

²⁰² Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 67.

²⁰³ Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404 403-404.

²⁰⁴ Van den Bergh GCJJ “Schijnbewegingen. Hercodificatie en eigendomsdefinitie” in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404 397-398.

public law driven changes, such as legislative and constitutional regulatory measures, as well as from the European Convention on Human Rights 1950.

More extensive regulation of the use, exploitation and enjoyment of property effectively resulted in the so-called “erosion” of the traditional concept of ownership, since the extensive rights of owners were said to be effectively curtailed to give adequate consideration to the public interest.²⁰⁵ Valkhoff and Van Maanen argue that this erosion of ownership was not necessarily a negative development since it led to the “socialisation” or “*vermaatschappelijking*” of ownership.²⁰⁶ However, socialisation presupposes the individual and absolute nature of property – meaning it was absolute and individual, but became (or can become) more socialised.²⁰⁷ This shows the limits of the functionalist approach – the change that could be effected through private law was restricted.

A type of functionalist approach also appeared in German literature.²⁰⁸ The German movement proposed a distinction between different types of property, namely *Funktionseigentum* and *kleineres Eigentum*. According to this theory the traditional view of ownership as an absolute, individualistic and abstract right should only apply to *kleineres Eigentum*, where individual autonomy and freedom is linked closely enough to the property

²⁰⁵ Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 26; Erasmus J “Striving towards social responsiveness in private property law: The Dutch functionalist approach” (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 530-546 535.

²⁰⁶ Valkhoff J *Een eeuw rechtsontwikkeling. De vermaatschappelijking van het Nederlandse privaatrecht sinds de codificatie (1838)* (2nd ed 1988) 199; Van Maanen GE *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) 26.

²⁰⁷ Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 254-256.

²⁰⁸ Van der Walt AJ “Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 27-29.

to trump the public interest.²⁰⁹ Ownership of property classified as *Funktionseigentum* should reflect greater social consciousness and should be subject to the public interest.²¹⁰ This “diversification” of ownership is an attempt to restrict the influence of the private law tradition of ownership as individual freedom.²¹¹ This approach, which focuses on constitutional or public law and its relationship to private law, was adopted in some form in modern German law, whereas the Dutch functionalist approach was primarily restricted to private law, lost momentum and was largely overtaken by developments in public law. I return to some of the constitutional aspects of the German approach in Chapter 3.

The debates surrounding the erosion of ownership and the possibility of adopting a pluriform ownership concept that took place in the Netherlands had a profound impact on South African legal thinking. Many of the solutions that were proposed by Dutch authors are still revisited by South African scholars, in an attempt to deal with various issues related to property in the South African context. Dutch functionalism is particularly interesting for purposes of this dissertation insofar as it illustrates the point that problems in private law doctrine are not necessarily solved by approaching the problem from within the conceptual framework that gave rise to the problem in the first place. The limited success of functionalism shows the importance of recognising and developing the link between private law and public law. In the context of the regulation of the use of property, this specifically

²⁰⁹ Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 443.

²¹⁰ Rey H “Dynamisiertes Eigentum” 1977 *Zeitschrift für Schweizerisches Recht* 65-80 72-74; Van der Walt AJ “Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I” 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 27.

²¹¹ Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 444.

means recognising and developing the link between private law doctrine and legislation, administrative law and the Constitution.²¹²

2 3 8 *The erosion of ownership*

Erosion theorists work with a truly absolutist (or libertarian) notion of ownership as a right that is by nature unrestricted, so that any new limitation is unnatural and too much limitation causes erosion of ownership. Erosion of ownership refers to the perception that ownership has been “whittled away” through increased regulation and that erosion threatens freedom and property, which lie at the heart of Western societies.²¹³

The idea of erosion of private ownership is linked to the traditional public law-private law divide. An increase in regulation is perceived as an encroachment of the public on the private, in the sense that ownership is closely connected to the protection of individual freedom.²¹⁴ However, property has never been exempt from social control, and increased regulation stems from social demands regarding the role and function of property.²¹⁵ Sax points out that property does not adapt automatically to social, political or economic changes, and regulation is one way of bringing property in line with new circumstances.²¹⁶

Erosion, despite its negative connotations, is not *per se* a negative development, because certain limitations serve the public interest and ensure adequate social responsibility within

²¹² This topic is addressed Chapters 3 and 4, where the relationship between property and regulation is reconsidered in the constitutional setting.

²¹³ Lewis C “The modern concept of ownership of land” 1985 *Acta Juridica* 241-262 241, 259-260; Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 436.

²¹⁴ Singer JW & Beermann JM “The social origins of property” (1993) 6 *Canadian Journal of Law and Jurisprudence* 217-248 224; Underkuffler-Freund LS “Property: A special right” (1996) 71 *Notre Dame Law Review* 1033-1058 1036.

²¹⁵ Honoré AM “Ownership” in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 107-147 144-147.

²¹⁶ Sax JL “Some thoughts on the decline of private property” (1983) 58 *Washington Law Review* 481-496 485.

the concept of ownership.²¹⁷ Van der Walt states that the increase in legislative limitations results in a larger convergence of private and administrative law and that this should not be met with concern, since this convergence is not new or foreign to property law.²¹⁸ Furthermore, he argues that the convergence may increase the functionality of property and could lead to a more socially responsible concept of ownership.²¹⁹

The perception that the quality or value of property rights is diminished through increased regulatory measures is not confined to civil law jurisdictions and the question has also come up in American property theory. Macey, for example, argues that the US Constitution endeavours to protect property rights and that while the basic structure of the Constitution has not changed, the protection offered has lessened.²²⁰ While this may be true, Singer argues that increased regulation is necessary because of the increasingly complex nature of society. Increased regulation of the use of property is a necessary response to complexity.²²¹ In this view, regulation does not erode the institution of private property, but makes it sustainable in and consistent with a free and equal society.²²²

2 4 Ownership in South African law

The South African definition of ownership is the product of various developments discussed above and the law of ownership has been heavily influenced by the interpretations and

²¹⁷ Lewis C “The modern concept of ownership of land” 1985 *Acta Juridica* 241-262 260.

²¹⁸ Van der Walt AJ “Developments that may change the institution of private ownership” (1990) 44 *Stellenbosch Law Review* 26-48 45.

²¹⁹ Van der Walt AJ “Developments that may change the institution of private ownership” (1990) 44 *Stellenbosch Law Review* 26-48 45.

²²⁰ See Grey TC “The disintegration of property” in Pennock JR & Chapman JW (eds) *Property* (1980) 69-85 69; Ely JW *The guardian of every other rights: A constitutional history of property rights* (2nd ed 1998) 4-5.

²²¹ The issue of complexity in the legal system is taken up in Chapter 5.

²²² Singer JW “Should we call ahead? Property, democracy, and the rule of law” (*publication forthcoming*) 6.

debates of centuries past. At present, ownership is defined as the most complete and comprehensive right that an owner can have over a thing and that he may, in principle, do as he pleases with his property,²²³ within the boundaries set by public and private law.²²⁴

This definition, accepted by courts and academics such as Van der Merwe and Scott, is regarded as authoritative in South African law.²²⁵ It originates from Bartolus' definition in the 14th century and Grotius's definition in the 16th century.²²⁶ However, ownership is not treated exactly the same in case law and in academic texts. The definition of ownership in case law such as *Gien v Gien*²²⁷ is precisely Bartolus' definition and is compatible with Grotius's approach in Roman-Dutch law.²²⁸ The courts stay within this definition and even when they use the term "absolute" it is to refer to the comprehensiveness of the owner's entitlements, and not absolute as meant by the Pandectists that is associated with the assumption that ownership is a pre-social and fundamentally unlimited right. In certain academic texts there are additional elements that are not reflected in case law and these elements exhibit Pandectist influence,²²⁹ although the authority cited is often from Roman or Roman-Dutch

²²³ *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

²²⁴ Van der Merwe *Sakereg* (2nd ed 1989) 171.

²²⁵ *Gien v Gien* 1979 (2) SA 1113 (T) 1120; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Johannesburg Municipal Council v Rand Townships Registrar and Others* 1910 TS 1314 1319. See Van der Merwe CG *Sakereg* (2nd ed 1989) 170-173; Scott S "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stellenbosch Law Review* 351-377 352.

²²⁶ Visser DP "The absoluteness of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 47; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 6-35 19; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2005) 94-95.

²²⁷ 1979 (2) SA 1113 (T).

²²⁸ Scott S "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stellenbosch Law Review* 351-377 discusses a number of cases to show that despite the theoretical influence of the absolutist approach, the approach of the courts have mostly not been influenced by Pandectism.

²²⁹ Cloete R *Onstoflike sake in die nuwe Suid-Afrikaanse sakereg* (2001) 48-52, 59 argues that the first edition of Van der Merwe's *Sakereg* (1979) introduced Pandectist thought into South African property law.

law.²³⁰ The influence of Pandectism is visible when the characteristics of ownership are discussed by academics, because they refer to notions of elasticity, abstractness, individuality and absoluteness to support the idea of the absolute use entitlement of owners, and to explain limitations as “exceptions” to an otherwise unqualified right.²³¹ Insofar as these characteristics convey the idea that ownership is absolute in the sense of being a pre-legal, fundamentally unlimited right, it is problematic.

The absolutist approach has had some influence in private law doctrine. However, the question arises whether the absolutist view is still relevant, especially in light of the influence of the Constitution. There are indications of the continued influence of absolutism on South African law. One example of general acceptance of this approach is found in a recent article published in the South African practitioner’s magazine, *De Rebus*. The article opens with the statement: “The concept of absolute ownership is one that is deeply entrenched in our law.”²³² The author adds that although limitations are imposed by law, the owner has “absolute control” over a thing owned.²³³ Therefore, despite express acknowledgements in the literature that ownership is subject to the limits of the law, at least some authors still treat

²³⁰ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 28; Van der Walt AJ “Introduction” in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 1-9 1.

²³¹ See for instance Sonnekus JC “Property law in South Africa: Some aspects compared with the position in some European civil law systems – The importance of publicity” in Van Maanen GE & Van der Walt AJ (eds) *Property on the threshold of the 21st century* (1996) 285-331 302-303.

²³² Majoni F “Mine or yours? A closer look at s 5 of the Mineral and Petroleum Resources Development Act” (2013) August *De Rebus* 42-45 43. See also Sonnekus JC “Property law in South Africa: Some aspects compared with the position in some European civil law systems – The importance of publicity” in Van Maanen GE & Van der Walt AJ (eds) *Property on the threshold of the 21st century* (1996) 285-331 300 where Sonnekus states that “the essence of ownership is the free disposition of the entitlements of the owner to his real rights on a thing”.

²³³ Majoni F “Mine or yours? A closer look at s 5 of the Mineral and Petroleum Resources Development Act” (2013) August *De Rebus* 42-45 43.

ownership as unrestricted and unlimited in nature, capable of tolerating limitations as exceptions that interfere with the otherwise unlimited rights of the owner.

Many authors have indicated dissatisfaction with the traditional view of ownership as an absolute right and various suggestions have been made to develop the South African ownership concept to provide for a greater measure of social responsibility.²³⁴ The historical importance of ownership cannot be disputed, but little research is needed to establish that the final word has not yet been spoken, especially in post-*apartheid* South Africa.²³⁵ Moreover, as Van den Bergh explains, ownership is one of the “fundamental factors” in shaping our social and political thought.²³⁶ This implies that in changing social and political times the re-evaluation of the role, function and limitation of ownership will be of renewed importance.²³⁷

The concept came under intense scrutiny after a lecture presented by Cowen in 1984.²³⁸ This lecture caught the attention of various academics, and several papers pertaining to the transformation of ownership were published in response to it.²³⁹ Cowen argues that the

²³⁴ See for example Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984); Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308; Van der Walt AJ “The effect of environmental conservation measures on the concept of ownership” (1987) 103 *South African Law Journal* 469-479; Van der Walt AJ “Developments that may change the institution of private ownership” (1990) 44 *Stellenbosch Law Review* 26-48; Van der Walt AJ & Kleyn DG “Duplex dominium: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260.

²³⁵ Schrage EJJH “*Ius in re corporali perfecte disponendi*: Property from Bartolus to the New Dutch Civil Code of 1992” in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 35-67 35.

²³⁶ Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 2.

²³⁷ Van der Walt AJ “The South African law of ownership: A historical and philosophical perspective” (1992) 25 *De Jure* 446-457 457.

²³⁸ See Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 15-30.

²³⁹ See the discussion by Van der Walt AJ “Introduction” in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 1-9 2 regarding the flurry of publications inspired by Cowen’s lecture.

traditional concept of ownership is being developed by “new patterns of landownership”.²⁴⁰ He focuses on the “mutability of the concept”, emphasising that institutions such as ownership are alive and although it is desirable for the law to be stable, it cannot stagnate and refuse to adapt to new circumstances.²⁴¹ Van der Walt and Kleyn link the academic debate surrounding the absoluteness of ownership to another pressing question relating to the uniformity or plurality of ownership.²⁴² Similar to the functionalist approach advocated by Dutch writers, Van der Walt and Kleyn argue that by accepting a divided or pluriform concept of ownership, the absoluteness of the traditional concept can be negated and allow for a socially responsible concept.²⁴³

The next big debate after Cowen’s lecture was inspired by the political negotiations and the first drafting of a new constitution to transition to a new democratic dispensation. It opened up many of the “old” debates regarding the nature, role and function of property in society and necessitated a critical reconsideration of many of the themes in this chapter.²⁴⁴ I return to this point in Chapter 3.

Not all academics are of the opinion that there are any significant developments taking place with regard to the concept of ownership, or that there is any need for future

²⁴⁰ See Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 2-4, 14-15; Van der Walt AJ “Introduction” in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 1-9 2.

²⁴¹ See Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 10.

²⁴² Van der Walt AJ & Kleyn DG “*Duplex dominium*: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 215-216.

²⁴³ Van der Walt AJ & Kleyn DG “*Duplex dominium*: The history and significance of the concept of divided ownership” in Visser DP (ed) *Essays on the history of law* (1989) 213-260 215-216. Also see Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 435-446.

²⁴⁴ Chaskalson M “The property clause: Section 28 of the Constitution” (1994) 10 *South African Journal for Human Rights* 131-139 131-132; Murphy J “Property rights in the new constitution: An analytical framework for constitutional review” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 623-644 623-624.

developments. Scott, for example, argues that the definition of ownership that was adopted in modern South African law can accommodate any changes in the legal landscape, as it has done over centuries. According to Scott there is no indication that there has been a shift in the approach that has been followed in South African law.²⁴⁵ However, her research focuses mainly on changes relating to or brought about by neighbour law. Many developments have taken place in the sphere of public law regulatory limitations, rather than in the sphere of limitations stemming from private law.²⁴⁶

Although I agree with Scott that Bartolus' definition can respond to changed circumstances, there has been subtle shifts in South African law, for instance from the idea that the owner can do what she likes toward more recognition of the qualification in Bartolus' definition, which might indicate one form of denying or responding to the absolutism of private law doctrine. Furthermore, there was some sympathy for functionalism at one stage, but with limited success. However, Dutch functionalism (or rather, its inadequacies) showed that change does not have to come from inside doctrine to be relevant or effective. The definition of ownership as it stands in South African law is therefore not in itself problematic and it is wide enough to adapt to social change. However, no property law system adapts automatically, and in the next chapter I consider how the Constitution influences ownership and the regulation of property.

²⁴⁵ Scott S "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 3 *Stellenbosch Law Review* 351-377 376-377. Scott's view is accepted and supported by other academics. See for example Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2005) 94-95.

²⁴⁶ See the reaction to Scott's arguments by Van der Walt AJ *Property in the margins* (2009) 25 footnote 56.

2 5 Conclusion: The inherent/external debate in private law doctrine

The property law landscape is still to a large extent dominated by the traditional abstract concept of ownership and the hierarchy of rights. However, South Africa is in the (continuous) process of restructuring its legal landscape to adapt to the changes that were introduced by the Constitution. This chapter set out a prominent private law debate for purposes of determining what the relationship between property and regulation is in private law doctrine. In this chapter, I consider some of the historical, doctrinal and theoretical aspects of ownership. This provides the foundation to critically consider the nature of limitations, the approach to regulation, and ultimately, the position of property (both doctrinally and theoretically) in South Africa's new constitutional dispensation.

In doctrinal thinking two theories are offered to explain how ownership is limited by regulation. The first theory regards ownership as a pre-social, pre-legal, fundamentally unlimited right and accounts for the occurrence of regulatory limitations by explaining that ownership can tolerate limitations that are exceptional and temporary, while ownership will revert back to its complete and absolute form as soon as the limitation falls away (elasticity). Authority for the absolutist approach is often sought in Roman or Roman Dutch law,²⁴⁷ but various authors have shown convincingly that this is a result of overemphasising certain characteristics,²⁴⁸ while not paying enough attention to others, as well as the inconsistent use of terminology.²⁴⁹ The absolutist concept of ownership in fact derives from the influence of

²⁴⁷ Rabie MA "The influence of environmental legislation on private landownership" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 81-101 81.

²⁴⁸ Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtgeleerd Magazijn Themis* 248-275 248; Van den Bergh GCJJ *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* (2nd ed 1988) 39-41, 44, 50.

²⁴⁹ Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *Rechtgeleerd Magazijn Themis* 248-275 254; Visser DP "The absoluteness of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 48; Van der Walt AJ & Kleyin DG "*Duplex dominium*: the history and

political and economic liberty and Pandectist theory in the 19th century.²⁵⁰ The characteristics attributed to ownership by especially the Pandectists that support the absolutist view are dispensable, since these characteristics are not part of Bartolus' or Grotius's original definition and never formed part of Roman-Dutch law.²⁵¹ Although the absolutist approach did play some role in private law doctrine, this was mostly in academic texts. It does not enjoy much support in case law.²⁵²

The second (alternative) theory holds that ownership is an inherently limited right and that regulatory limitations are manifestations of these inherent limitations. According to this theory, ownership never manifests itself without at least some limitations, although the content and scope of limitations can vary. This issue highlights the difference between inherent limitation of and external limitation of rights, since, depending on which theoretical approach is supported, the outcome might be completely different.

Insofar as the inherent limitation theory is supported, it could be argued that because property is subject to the inherent limitation of building restrictions, any restriction imposed on the property is a manifestation of the inherent limitation and the right holder is not deprived of any entitlement because he never held that entitlement to begin with. The manifestation of the limitation must adhere to the constitutional and statutory requirements for a valid deprivation, and its effects can be tested to ensure a measure of proportionality, but the imposition or existence of the limitation need not be justified. Conversely, if the absolutist approach is supported, every newly decreed limitation must be justified because the

significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 216; Pienaar G "Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 307.

²⁵⁰ Van der Walt AJ & Kleyn DG "Duplex dominium: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 217.

²⁵¹ Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 457.

²⁵² Cloete R *Onstoflike sake in die nuwe Suid-Afrikaanse sakereg* (2001) 48-52, 59.

limitation is imposed externally on an otherwise complete right. This is the basis of the perception that the right-holder is losing some entitlement that he previously held.

The point of the discussion in this chapter is to do more than to show that property rights have always been subject to some form of limitation. Specifically, the historic overview shows that there is little to no tendency towards absolutism before Pandectism. However, it illustrates the point that the question of absolutism and its implications for purposes of regulation arises in both common law and civil law traditions, despite doctrinal and historical differences. I argue that the centrality of the inherent/external debate in South African private law doctrine is based on assumptions regarding the role, nature and function of property in private law doctrine and the traditional rights paradigm which is based on Roman and Roman-Dutch law and influenced to a certain (limited) extent by Pandectist thinking. Even if the inherently-limited approach is accepted, its potential for enabling transformation of the ownership concept is limited, because it is firmly rooted in private law doctrine.

Arguably, Bartolus' definition in its original form could be adequate to serve the needs of modern day society.²⁵³ The definition, prior to the interpretations and developments imposed by the Pandectists, is broad enough to serve as a point of departure, especially when equal importance is attached to "*perfecte disponendi*" and "*nisi lege prohibeatur*". Such an approach would possibly allow for ownership to be regarded as inherently limited. If ownership is treated as an inherently limited right, not all instances of regulation or restriction would be seen as manifestations of these inherent limitations, but the fact of limitation would be inherent. This view implies that specific instances of limitation or restriction can be

²⁵³ Van den Bergh GCJJ "Schijnbewegingen. Herodificatie en eigendomsdefinitie" in Goffin P (ed) *Liber Amicorum John Gilissen* (1983) 389-404 400, 403; Van der Walt AJ "The effect of environmental conservation measures on the concept of ownership" (1987) 103 *South African Law Journal* 469-479 478; Scott S "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stellenbosch Law Review* 351-377 351.

increased or varied, depending on the needs of society, without depriving the owner of any of her rights. This would allow for greater flexibility within the institution of private ownership to determine the content of an owner's rights or entitlements at any given time with reference to the current social and economic needs.

Pienaar argues convincingly that developments with regard to ownership in modern South African law should not be met with suspicion or concern, but rather with a degree of realism, since continued development is not only inevitable, but also desirable.²⁵⁴ Furthermore, although he is not critical of the more individualised approach to ownership *per se*, he is of the opinion that ownership of especially immovable property should be within the grasp of as many people as possible and an absolutist view might hinder the achievement of this goal.²⁵⁵ Pienaar expressed this opinion in 1986 and it still rings true almost 30 years later. In fact, the argument can be made that these considerations of “opening up” the absolute nature of ownership is in line with a constitutional imperative of creating an equal and just society.

Social influences on the ownership concept do not necessarily translate into a socialist view of ownership, since all legal systems are influenced by a variety of social factors and considerations.²⁵⁶ However, insofar as the private law doctrine concept of ownership does not make adequate provision for the duties or obligations that attach to ownership, it is a serious shortcoming.²⁵⁷ The point of departure is that property is (and always has been) subject to

²⁵⁴ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 307.

²⁵⁵ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 308.

²⁵⁶ Pienaar G “Ontwikkelings in die Suid-Afrikaanse eiendomsbegrip in perspektief” 1986 *Tydskrif vir die Suid-Afrikaanse Reg* 295-308 303.

²⁵⁷ *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape and Another* 2007 (4) SA 26 (C) 37C-D. Also see Rabie MA “The influence of environmental legislation on private landownership” in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 81-101 82, 100. See Alexander GS “The

limitations and thus it seems desirable to opt for an approach that will acknowledge that at least some limitations are inherent to ownership, instead of maintaining that restrictions are unnatural or exceptional instances of limitation of an otherwise absolute concept. However, I argue from Chapter 3 onward that in light of the Constitution, the alternative private law theory of inherently limited ownership is also inadequate, because it stays within the framework of conceptualism that is part of private law doctrine. A more radical departure from tradition is needed to address issues of property and regulation in the constitutional context, because, as Van der Walt points out, “the answers that we are looking for will not be found within the paradigm of established conceptual reasoning.”²⁵⁸

Contrary to the position taken in doctrinal thinking, the parameters of property entitlements should continuously be re-evaluated.²⁵⁹ In that sense there is an important lesson to take from the Dutch functionalists. The idea of functional diversification had promise and strong aspects, but ultimately it was limited by the fact that the functionalists were working within the established private law doctrinal tradition where ownership dominated the hierarchy of rights.²⁶⁰ Many of the most significant (social) changes to ownership came from outside of private law doctrine.

Private law doctrine focuses on individual entitlements, and both private law theories (that explain the nature of limitations imposed on property) retain this focus. The reason why this is problematic seems to be that the focus on individual rights leaves little scope to consider

social-obligation norm in American property law” (2009) 94 *Cornell Law Review* 745-819 for an overview of some of the arguments why obligations ought to feature more prominently in property discourse.

²⁵⁸ Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 433.

²⁵⁹ Underkuffler LS “A theoretical approach: The lens of progressive property” (2014) 3 *Property Law Review* 152-159 154.

²⁶⁰ Van der Walt AJ “The fragmentation of land rights” (1992) 8 *South African Journal on Human Rights* 429-450 446.

non-property interests or contextual factors. Moreover, the over-emphasis of the individual interest (to the detriment of other constitutional considerations) is problematic insofar as it appears to contradict the approach to property and regulation in terms of section 25 of the Constitution.²⁶¹ Secondly, the complexity of the legal system in which both property rights and limitations exist is not adequately accounted for in private law doctrine, being reductionist in nature. The private law tradition of conceptualism relies on simplification, but property goes beyond private law doctrine, as it is also a social, cultural and public phenomenon.²⁶² Therefore a different approach to the regulation of the use of property is necessary in the constitutional setting. The approach that I propose is set out in more detail in Chapters 3, 4 and 5.

This chapter provides a bird's eye view of how ownership, as an institution and as a concept, developed over time and in different societies. The most important conclusion that can be drawn at this stage is that ownership is not necessarily the abstract, timeless, universal institution that is regarded as the embodiment of economic freedom, but rather "a process that works itself out in dialogue".²⁶³ In South African law, this "conversation" will be based on and influenced by the Constitution. The Constitution provides a framework for a new understanding of the property system in South African law, and in Chapters 3 and 4 I consider the role and status of property and regulation in this "new" framework in more detail.

²⁶¹ Consider for example the dictum of Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 11-23.

²⁶² Davies M *Property: Meanings, histories, theories* (2007) 2.

²⁶³ Van der Walt AJ "The fragmentation of land rights" (1992) 8 *South African Journal on Human Rights* 429-450 448. The formulation of ownership as a process of dialogue stems from the work of Callies RP "Eigentum als Institution: Aspekte zur Theorie des Institutions" in Kaufmann A (ed) *Rechtstheorie: Anzdtse zu einem kritischen Rechtstverständnis* (1971) 119-174 121.

Chapter 3

The regulation of property in the constitutional context

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3 1 Introduction

The constitutional protection of property was an extremely contentious issue in South Africa during the negotiations for a peaceful transition to a democratic society.¹ One of the reasons why the constitutional protection of property is such a vexed question is the perceived incompatibility of the idea of private property and the idea of change.² Traditionally, there are traces of absolutism in South African private law doctrine, which characterises ownership as an abstract, universal and absolute right. This makes it possible to view property as a natural, fundamentally unregulated right that is impervious to external influence (context), although it can tolerate some limitations.

In this view, limitations do not change the essence of the right; it will revert back to its full and unlimited form when the limitation falls away. Any changes to property entitlements are therefore regarded as temporary. This perceived incompatibility of the idea of property with the idea of change is problematic in South Africa's current legal, social and political landscape, where there is an on-going process of "transformative constitutionalism".³ In light of the changes introduced and mandated by the Constitution,⁴ it became unavoidable to

¹ See Chaskalson M "The property clause: Section 28 of the Constitution" (1994) 10 *South African Journal for Human Rights* 131-139 for a more detailed discussion.

² Underkuffler LS "Property and change: The constitutional conundrum" (2013) 91 *Texas Law Review* 2015-2037 2016 argues that the collision between the idea of property and the idea of change explains the incoherence of American takings jurisprudence as developed by the US Supreme Court. However, the difficulty in reconciling the idea of change with the traditional perception of property is a broader problem and arguably also describes the South African position.

³ Klare K "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146-188 150 uses the term "transformative constitutionalism" to refer to a "long term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." See also Davis DM & Klare K "Transformative constitutionalism and the common and customary law" (2010) 26 *South African Journal on Human Rights* 403-509 409.

⁴ Constitution of the Republic of South Africa, 1996, hereafter referred to as "the Constitution". In the previous chapter the discussion centred on the nature and characteristics of specifically ownership. In this chapter the

critically consider the role of property in society. The constitutional protection of property is meant to have both a protective and a transformative objective.⁵ However, because property rights (and ownership in particular) are viewed in a particular way in private law doctrine, the protective aims of section 25(1) are often over-emphasised. In reaction to the (potential) absolutism of private law doctrine, debates regarding the nature of ownership and limitations receive new attention. In pursuance of constitutional aims and objectives, existing property entitlements are subjected to new or more intense regulatory measures and increased legislative and administrative intervention in the private domain, which caused erosion theorists to protest against the influx of regulatory measures.

Recently, Froneman J emphasised the importance of the constitutional conversation regarding the role and function of the protection and regulation of property entitlements.⁶ He stated that this conversation is vital to South Africa's constitutional project, and that ultimately, solutions must be developed by seeking "a conception of property in the Constitution itself, and not by falling back on preconceived notions of property not rooted in the Constitution."⁷ He stressed that it is necessary to "seek our own constitutional conception of property within the normative framework of the fundamental values and individual rights

focus will widen to discuss the effect of regulation on property rights in general, since the constitutional notion of property goes beyond ownership and includes rights to which the idea of absoluteness in the sense of abstract completeness does not and cannot apply. Furthermore, section 25 does not clearly specify whether "property" refers to objects of property or rights in property, although section 25(4)(b) indicates that "property is not limited to land". See Van der Walt AJ *Property and constitution* (2012) 113-114, 118; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 530.

⁵ Alexander GS "The potential of the right to property in achieving social transformation in South Africa" (2007) 8 *ESR Review* 2-9 2-3.

⁶ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 4, 30-36.

⁷ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 36.

in the Constitution.”⁸ This is precisely the aim of this chapter: to contribute to the development of a property law system that is in line with the normative framework of the Constitution, by specifically focusing on the relationship between property and regulation.

South African lawyers, judges and academics are continuously involved in the process of reconsidering these debates in the constitutional context. This dissertation forms part of that process by reconsidering the relationship between property and regulation. Chapter 2 shows that the rise of absolutism in private law doctrine was not inevitable, nor did it form a unanimously accepted part of South African private law, and the problematic aspects of Pandectism are not a *sine qua non* for private ownership.

In Chapter 3, I argue that property is a constitutionally-framed, inherently regulated right that fits into the larger constitutional legal system. I set out the role and status of regulation of the use of property with reference to section 25(1) to determine what the approach to regulation should be in the constitutional setting. The constitutional analysis in this chapter shows that there is more emphasis than before on reconciling individual property entitlements with other interests, and property is protected only to the extent that is reconcilable with the spirit, purport and objects of the Bill of Rights. The approach to regulation that I suggest follows this trend, and does not focus on individual rights, but instead is based on a systemic perspective of property and regulation. The normative framework of the Constitution envelops the legal system and all law exists within its boundaries, which creates the opportunity to adopt a systemic constitutional approach to the regulation of the use of

⁸ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 36.

property.⁹ I discuss the approach to the regulation of the use of property in German constitutional law, as an example of how a systemic constitutional approach functions.

3 2 Overview and terminology

Section 25 of the Constitution protects property as part of the Bill of Rights. However, this constitutional protection does not mean that property is insulated against regulatory limitation.¹⁰ Instead, because the state must be able to regulate property to promote and protect the public interest, section 25(1) explicitly makes provision for deprivation of property and sets out the requirements that must be met in order for deprivations to be constitutionally valid.¹¹ Consequently, the property clause must be interpreted in such a way as to strike the appropriate balance between the protection of private property and the need to ensure that property “serves the public interest”.¹²

⁹ This argument is based on the supremacy of the Constitution and the single-system-of-law principle which are discussed in more detail in Chapter 4.2.

¹⁰ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 190; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 96.

¹¹ See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 214, 218, 251.

¹² *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 81. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 17, 42; Chaskalson M “The problem with property: Thoughts on the constitutional protection of property in the United States and the Commonwealth” (1993) 9 *South African Journal on Human Rights* 388-411; Van der Walt AJ “Transformative constitutionalism and the development of South African property law (part 2)” 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 1-31.

Traditionally, the state's regulatory power or "police power" is said to enable it to regulate property in the interest of public health and safety.¹³ However, with the rise of the administrative state, it is clear that the state can limit property rights for a wide range of reasons, including environmental conservation, land use management and cultural and heritage conservation, to name but a few. However, the question whether a regulatory measure falls closer to or further from this "core function" of regulatory power might influence the standard of review.¹⁴

In this section the meaning of "deprivation" is set out to establish clarity. Conceptual clarity is central to the regulation of the use of property with reference to section 25(1), because "deprivation" is sometimes used interchangeably in the literature with "limitation" or "regulation" to signify that the use, enjoyment or exploitation of property is or can be restricted.¹⁵ However, these terms are not synonyms in the constitutional context.¹⁶

Defining the term "deprivation", as used specifically in the context of section 25(1) of the Constitution, is the first step to determine when the regulation of property constitutes a deprivation. The approach of the Constitutional Court has thus far not been uniform when presented with the opportunity to engage with the difficulties surrounding the terminology.

As a point of departure, a deprivation is generally defined as an "uncompensated, regulatory restriction or limitation on the use, enjoyment and exploitation of property, in

¹³ The state's power in relation to property has three dimensions, namely the police power, the power of eminent domain and the taxing power. See Murphy J "Property rights in the new constitution: An analytical framework for constitutional review" (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 623-644 630.

¹⁴ See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 214, 218, 251.

¹⁵ The terms "limitation" and "regulation" are defined in Chapter 1.

¹⁶ See for example Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 315 where it is explained that "deprivation" is a generic term which circumscribes a whole range of various interferences with the rights of citizens to their property. She also indicates that the terms "regulatory interference" and "acts of police power" are sometimes used to convey the same idea.

terms of legislation or other ‘law’”.¹⁷ This is referred to as the “police power” of the state to regulate the use, enjoyment and exploitation of property to protect and promote public health and safety.¹⁸ Deprivations are usually distinguished from expropriations insofar as both constitute a restriction of property rights, but rights-holders are usually not compensated for deprivations, whereas expropriation is usually subject to payment of compensation.¹⁹ One of the main distinguishing factors between deprivation and expropriation is the factor of state acquisition.²⁰ Especially after *Agri South Africa v Minister of Minerals and Energy*²¹ it seems clear that state acquisition is an element of expropriation,²² while deprivations are primarily aimed at the regulation of the use and enjoyment of private property. However, deprivation can bring about a substantial measure of loss or reduction in value of the property.²³

The interpretation of section 25(1) of the Constitution was the focal point of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.²⁴ In this decision the Constitutional Court declined to give a comprehensive or exhaustive definition of the term “deprivation”, but supported a wide interpretation of the term in principle.²⁵ In terms of this

¹⁷ Van Wyk J *Planning law* (2nd ed 2012) 213. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 196 for a more detailed discussion.

¹⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 195.

¹⁹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 192; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 543; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 279.

²⁰ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 541.

²¹ 2013 (4) SA 1 (CC).

²² *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 48. Hereafter referred to as *Agri South Africa*.

²³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 196.

²⁴ 2002 (4) SA 768 (CC). Hereafter referred to as *FNB*.

²⁵ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-18.

wide approach all restrictions imposed on property will be regarded as deprivations, since “any interference with the use, enjoyment or exploitation of private property” qualifies as a deprivation that must comply with the requirements set out in section 25(1).²⁶

This broad formulation was not applied uniformly in subsequent case law. In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng*²⁷ the Constitutional Court apparently restricted the interpretation given to the term “deprivation” in the *FNB* decision.²⁸ This decision created confusion, since it indicated its agreement with the interpretation provided in *FNB*, but upon closer inspection the scope of the definitions is not identical.²⁹ In the *Mkontwana* decision deprivations were defined as instances of regulation “that go ... beyond the normal restrictions on property use or enjoyment found in an open and democratic society”.³⁰ It has

²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 203-204.

²⁷ 2005 (1) SA 530 (CC). Hereafter referred to as *Mkontwana*.

²⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32.

²⁹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 204; Van der Walt AJ “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 79-80 for a detailed discussion regarding the interpretation of the Court’s statements.

³⁰ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32.

been stated above that one of the purposes of section 25(1) is to assert the police power of the state to regulate private property, which is not incompatible with the values of an open and democratic society. It seems illogical to restrict the application of section 25(1) only to instances of serious restrictions or restrictions that somehow extend beyond what is acceptable in open and democratic societies. All instances of regulatory limitation should be capable of being assessed against the requirements set by section 25, regardless of their severity.³¹

The confusion created by the *Mkontwana* decision was evident in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*,³² where the Court remarked that the *Mkontwana* judgment “expanded the notion of deprivation of property for purposes of section 25”.³³ This is clearly not the case, since even the most lenient interpretation of the Court’s definition in *Mkontwana* would still restrict deprivations to instances of “extremely serious interferences with property”.³⁴

The confusion escalated further in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others*,³⁵ where the Constitutional Court applied the *FNB* definition, but cited *Mkontwana* as authority for its approach.³⁶ The *Offit* decision moved away from defining deprivations in terms of what is normal in an open and democratic society and instead focused on whether the regulation had a legally relevant

³¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 205-206.

³² 2009 (6) SA 391 (CC). Hereafter referred to as *Reflect-All*.

³³ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 35.

³⁴ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 205.

³⁵ 2011 (1) SA 293 (CC). Hereafter referred to as *Offit*.

³⁶ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 38.

impact on the rights of a property holder, despite professing to follow the *Mkontwana* definition.³⁷

In *National Credit Regulator v Opperman and Others*³⁸ the Constitutional Court provided greater clarity by holding that any legally significant interference with property amounts to a deprivation in terms of section 25(1).³⁹ This is indicative of acceptance of the wider approach first suggested in the *FNB* decision.

In *Agri South Africa* the Constitutional Court said that “deprivation always takes place when property or rights therein are either taken away or *significantly* interfered with”,⁴⁰ which seems to again lean more towards the narrow or strict approach of the Court in the *Mkontwana* decision. However, it is also possible that the wording of the Court was intended to refer to its decision in *Opperman*, where “a legally significant” impact was required. Despite the confusion that the Constitutional Court created through its imprecise language, it seems fairly certain that a wide definition is preferred, and a litigant will not be precluded from bringing a case to test the constitutional validity of a restriction placed on his property rights against the requirements of section 25(1).⁴¹

Furthermore, in *Agri South Africa*, the Court alluded to the difference between “limitation” and “deprivation” when Mogoeng CJ stated that “[w]hen a determination has to be made whether there was deprivation of property, an affirmative answer would necessitate a further enquiry into the extent, if any, to which that deprivation limits the section 25(1)

³⁷ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) paras 44-46. Van der Walt AJ *Constitutional property law* (3rd ed 2011) 208; 263.

³⁸ 2013 (2) SA 1 (CC). Hereafter referred to as *Opperman*.

³⁹ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 66, referring to *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) paras 39, 41. See also Van der Walt AJ “Constitutional property law” (2013) 1 *Juta’s Quarterly Review* at 2.1.

⁴⁰ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 48 (own emphasis added).

⁴¹ Alexander GS “The potential of the right to property in achieving social transformation in South Africa” (2007) 8 *ESR Review* 2-9 5-6.

right”.⁴² This is an important distinction: if there is a constitutionally valid deprivation, there is no limitation of the section 25(1) right, even if the extent of the limitation is quite severe, since section 25(1) explicitly makes provision for the limitation of property rights by means of deprivation, subject to the requirements listed. In other words, if the requirements are complied with, there was a deprivation, but no limitation of the section 25 right.⁴³ A property’s holder right under section 25(1) is not infringed by the act of deprivation, but by *unauthorised* or *arbitrary* deprivation. Therefore it is incorrect to regard a valid deprivation as a limitation of the right to property in terms of section 25(1), although one can generally refer to the effect of regulatory measures as limitations that are imposed on property entitlements.

Whether the wide definition, as proposed in the *FNB* and *Opperman* decisions, or the narrow interpretation of *Mkontwana* (and possibly *Agri South Africa*) is accepted as correct, will have an impact on when a rights holder will be able to challenge a regulatory limitation in terms of section 25(1). If it is accepted that all instances of legally significant state intervention with property qualify as deprivation for purposes of section 25(1), any such restriction must meet the requirements for a valid deprivation as set out in section 25(1) and any person whose rights are affected by such a regulatory restriction may approach the court to test the validity of the deprivation against these requirements, subject to the operation of the subsidiarity principles.⁴⁴ On the other hand, if it is accepted that only regulation that “goes further” than the “normal restrictions” one can expect in an open and democratic

⁴² *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 49.

⁴³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 196.

⁴⁴ I discuss the subsidiarity principles in more detail in Chapter 4.2. Recently, the wide approach was again confirmed in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 73-76.

society qualify as deprivation, the category of regulatory deprivations that can be challenged in terms of section 25(1) will be much smaller.⁴⁵

The conclusion that can be drawn from the case law seems to be a general preference for a wide interpretation of the term “deprivation”, which would allow any legally significant (as opposed to a *de minimis*) interference with property rights to be challenged in terms of section 25(1).⁴⁶ Throughout this chapter, this is the preferred interpretation attached to the term “deprivation”, unless a contrary definition is expressly indicated.

3 3 Regulation of the use of property in terms of section 25(1) of the Constitution

3 3 1 Background

The constitutional notion of “property” is arguably different from its private law interpretation, but cannot stand completely removed from it.⁴⁷ The private law notion and the constitutional notion of property differ in scope, but will (and should) influence each other.⁴⁸ This wider approach will encourage recognition of a variety of interests as “property” for

⁴⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 213.

⁴⁶ Van der Walt AJ “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 80; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 264; Alexander GS “The potential of the right to property in achieving social transformation in South Africa” (2007) 8 *ESR Review* 2-9 5-6.

⁴⁷ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 86,114,129; Van Wyk J *Planning law* (2nd ed 2012) 211.

⁴⁸ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 39-41, 59. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 86.

constitutional purposes.⁴⁹ Arguably, this lessens the importance that is attached to ownership as the “trump-all” in the rights paradigm in private law doctrine, since other property rights (and even non-rights) will occasionally trump ownership in the constitutional arena.⁵⁰ It is clear that the protection offered in section 25 is not restricted to ownership,⁵¹ and ownership should not be allowed to dominate constitutional property law disputes.⁵² Recently, the Constitutional Court emphasised that although a wide notion of “property” might be appropriate for purposes of section 25(1) of the Constitution, it should not have the effect of making legislative regulation impractical or impossible, thereby inhibiting the transformative objectives of the Constitution.⁵³

Section 25(1) of the Constitution declares that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. The *Reflect-All* decision indicated that the purpose of section 25 is to protect property rights against *illegitimate* and *unfair* state interference. Naturally this means that

⁴⁹ Van der Walt AJ “Tradition on trial: A critical analysis of the civil-law tradition in South African property law” (1995) *South African Journal on Human Rights* 169-206 189; Van der Walt AJ *Property and constitution* (2012) 113.

⁵⁰ This is in line with the interpretative guidance that Sachs J offered in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 11-23 where he urged moving away from the framework of conceptualism and the hierarchical rights-paradigm, and instead adopting a more context-sensitive approach. A context-sensitive approach will arguably give rise to other potential challenges, including lengthy and costly litigation. Because of this, a context-sensitive approach does not find favour in utilitarian thinking. I respond to some of these challenges in Chapters 5.3 and 6.2.4 where I argue that despite the implications for systemic efficiency, it is worthwhile and arguably constitutionally-mandated to adopt a non-reductionist, context-sensitive approach even in cases where ownership would traditionally have been the strongest right. Also see in general Baron JB “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-967 for a more detailed discussion of the challenges of a context-sensitive approach to property disputes.

⁵¹ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 61.

⁵² Van der Walt AJ *Constitutional property law* (3rd ed 2011) 107; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 583.

⁵³ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) para 83; *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 25.

legitimate and fair regulatory measures are sanctioned by section 25 of the Constitution, with the effect that private property rights are not insulated against state action, but rather expressly limited by the possibility of legitimate regulatory action taken by the state. All property rights are therefore held and exercised subject to the possibility of legitimate deprivation. This enables the state to balance private and public interests and take steps to transform existing patterns of property rights.⁵⁴

In effect, section 25 provides the “parameters of regulation of private property”.⁵⁵ Consequently, section 25(1) serves a two-fold purpose.⁵⁶ Firstly, it ensures that property can be limited for various purposes, for example to allow the state to fulfil its police power function, and secondly it protects property rights against arbitrary or otherwise unlawful restrictions.⁵⁷ It therefore sets out the requirements that must be met for a deprivation to be constitutionally valid, and it creates a regulatory framework to control the imposition of the regulation. Section 25(1) justifies the state’s police power to regulate, and at the same time limits the state’s power by setting out the conditions that have to be met for the state action to be constitutionally valid. This secondary regulatory function of section 25 is discussed in more detail in Chapter 4.

Shortly after the adoption of the 1996 Constitution, it was debated whether section 25 protects property, or whether it merely protects a truncated property right.⁵⁸ The notion that a

⁵⁴ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 33. Also see Badenhorst PJ, Pienaar JM & Mostert H Silberberg and Schoeman’s *The law of property* (5th ed 2005) 521.

⁵⁵ Badenhorst PJ, Pienaar JM & Mostert H Silberberg and Schoeman’s *The law of property* (5th ed 2005) 521.

⁵⁶ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 17.

⁵⁷ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 17.

⁵⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 36; 89. Van der Walt indicates that this term was first used by Professor FI Michelman in informal discussions on the topic. Also see Roux T & Davis D “Property” in Cheadle MH, Davis DM & Haysom NRL (eds) *South African constitutional law: The bill of rights* (2nd ed 2013) 20-1 – 20-28 at 20-8.

truncated property right is protected means that section 25 only protects property rights against deprivations and expropriations that do not meet the criteria set out in section 25 and not property as such. While a textual reading of section 25 could support this argument, Van der Walt argues that this argument was developed to prevent the immunisation of existing property rights against transformation and reform initiatives.⁵⁹ However, because the constitutionalisation of property should be seen in the correct interpretative framework, the “truncated-right” argument is not necessary to ensure that existing property rights are not insulated from regulatory limitation.⁶⁰ Read as a whole, section 25 asserts the nation’s commitment to restitution and transformation, and this is indicative of the various interests that come into play in the constitutional sphere.

In the context of analysing the constitutional validity of limitations, it is useful to work within the paradigm that views property as a constitutional right.⁶¹ This ensures that the point of departure is not unfairly tilted in favour of the (near absolute) protection of rights, and serves as a reminder that property functions within the normative framework of the principles, values and goals of the Constitution.⁶² There are several important consequences that flow from treating property as a constitutionally-framed right. Firstly, not every entitlement (as opposed to right) that is protected in terms of private law will necessarily be protected (or protected to the same extent) in the constitutional context.⁶³ Secondly, the notion of “property” is wider in the constitutional context than in private law, and therefore interests that are not regarded or protected as property in private law (although they may be

⁵⁹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 88-89.

⁶⁰ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 92.

⁶¹ Michelman FI “Property as a constitutional right” (1981) 38 *Washington and Lee Law Review* 1097-1114 1102-1103, 1108-1113.

⁶² Van der Walt AJ *Constitutional property law* (3rd ed 2011) 102; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 16.

⁶³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 41, 101. Also see Radin M *Reinterpreting Property* (1993) 126-130 in relation to the notion of conceptual severance in the constitutional context.

protected in a different way) may be protected as property in terms of section 25.⁶⁴ Consequently, property cannot be viewed or protected in exactly the same manner as is the case in private law.⁶⁵ Thirdly, as a fundamentally regulated right property exists only to the extent recognised and protected by the Constitution as a whole. In the constitutional legal system there are no pre-legal or pre-social rights that fall outside the ambit of the system.

The point of working with “property as a constitutional right” is not to insulate private law from the Constitution’s reach by adhering to the traditional private/public divide of Roman-Dutch law and creating two separate (parallel) property systems, but rather to realise that rights, including property rights, protected under the Constitution are political rights which do not only serve to protect economic value. By taking this broader view of property as a constitutional right, the Constitution (and not only section 25) tells us something more about the substance of what is protected by the property clause and what the purpose of regulation is.⁶⁶

⁶⁴ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 101, 128-169; Van der Walt AJ *Property and constitution* (2012) 116. There is literature dealing with what is (and ought to be) included within the ambit of constitutional property. However, it is not necessary for purposes of this chapter to analyse these materials and as point of departure it is accepted that the notion of constitutional property is wider than that of property in the strict private law sense.

⁶⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 42.

⁶⁶ Michelman FI “Property as a constitutional right” (1981) 38 *Washington and Lee Law Review* 1097-1114 1112. Michelman’s suggestions in this regard are particularly fitting in the South African context, especially keeping in mind the Constitutional Court’s directive in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 647 (CC) para 44 that there is only one system of law in South Africa and it is shaped and informed by the Constitution, which is the supreme law. This discussion is expanded on in Chapter 4. See Sachs J’s remarks in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 31; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 14-23.

In *Reflect-All*⁶⁷ the Constitutional Court correctly stated that “property rights under our constitutional dispensation cannot be properly understood outside its historical context, formulation and social framework”.⁶⁸ The absolutism of private law doctrine can therefore not simply be ignored. Van der Walt points out that the conceptual and logical structures within which property disputes are usually decided are dominated by an “abstract view of the syllogistic relationship between rights and remedies”.⁶⁹ In this view a rights holder will be entitled to a remedy that will trump the rights or interests of a party with either a weaker right or no right. This hierarchy leaves very little room for contextual considerations and the effect of vindication is usually disregarded as irrelevant.⁷⁰ In recent decisions there has been evidence of a move away from the hierarchical structure that dominated property disputes toward a non-hierarchical, contextual approach.⁷¹ This move is discussed in more detail below.

3 3 2 *The FNB methodology*

3 3 2 1 *Background*

The *FNB* decision provided much-needed guidance and direction on how the property clause in the final Constitution ought to be interpreted.⁷² One of the decision’s important

⁶⁷ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC).

⁶⁸ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 32.

⁶⁹ Van der Walt AJ *Property and constitution* (2012) 115.

⁷⁰ Van der Walt AJ *Property and constitution* (2012) 116.

⁷¹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-23, 31; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 53.

⁷² Van der Walt AJ *Constitutional property law* (3rd ed 2011) 75; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-2.

contributions is that it sets out a series of steps or stages that constitute an appropriate methodology to approach constitutional property disputes and to determine the constitutional validity of a deprivation.⁷³

According to the Constitutional Court the stages of a property clause dispute are evident in the following questions.⁷⁴ Firstly, it must be considered whether that which is taken away from the right-holder amounts to property, as understood in the context of section 25. Secondly, has there been a deprivation of property through state action? If the second question is answered in the affirmative, the court must consider whether the deprivation complies with the requirements of section 25(1). If the court finds that there is no deprivation, the matter ends there. When the court establishes that a deprivation is inconsistent with section 25(1), the next question is whether that deprivation can be justified in terms of section 36 of the Constitution.⁷⁵

The stages of inquiry then move on to expropriation, where the first question is whether a deprivation that either complies with section 25(1) or can be justified in terms of section 36 amounts to an expropriation for purposes of section 25(2). If the deprivation amounts to an expropriation, the court must test the expropriation against the requirements of section 25(2)(a) and (b) to determine whether the expropriation complies with the constitutional

⁷³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 222; Van der Walt AJ “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 77.

⁷⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

⁷⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46

requirements. If it fails to comply with the requirements, the court should consider whether the expropriation can be justified under section 36.⁷⁶

The issues addressed in this chapter mainly fall into the second and third stages of the *FNB* methodology. Roux predicts that various considerations would be usurped into the arbitrariness question.⁷⁷ For example, the first step should be to consider whether a property interest has been affected by the alleged deprivation and only after this hurdle has been cleared should the court consider whether there has been a deprivation of property.⁷⁸ But according to Roux, the “vortex effect of the methodology” might cause this “threshold question” to be either glossed over or skipped entirely.⁷⁹

Section 25(1), as interpreted in the *FNB* decision, provides a framework for the legitimate regulation of property. The requirements that must be met are discussed in more detail in the following section, since the interpretation given to these requirements will determine the size of the regulatory space within which the legislature is allowed to validly regulate the property regime.

⁷⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-3.

⁷⁷ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-3.

⁷⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

⁷⁹ Roux T “Property” in Woolman S, Roux T and Bishop M (eds) *Constitutional law of South Africa* vol 3 (2nd ed OS 2003) 46 2-5, 9-11, 23-25. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 109.

3 3 2 2 Overview

Section 25(1) of the Constitution sets out the formal requirements that state action must comply with for deprivations imposed on property to be constitutionally valid. According to section 25(1), deprivations must be effected in terms of law of general application, which may not permit arbitrary deprivations. These two requirements ensure that deprivation is not contrary to the due process of the law.⁸⁰ Deprivation can therefore only take place in accordance with law of general application, it should affect people equally and it should be for a public purpose.⁸¹ The question of arbitrariness has two components, namely substantive arbitrariness and procedural arbitrariness.⁸²

In the *FNB* decision the Constitutional Court engaged with the interpretation and meaning of the non-arbitrariness requirement in section 25(1).⁸³ Van der Walt explains that prior to the *FNB* decision it was uncertain how the term “arbitrary” would be interpreted. The options were that it could be interpreted to refer to a “thin” rationality test or, alternatively, a “thick”,

⁸⁰ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 219. If the constitutional validity of the deprivation is evaluated in terms of section 33 of the Constitution and PAJA, the requirements include lawfulness, reasonableness and procedural fairness.

⁸¹ The public purpose requirement is not explicitly mentioned in section 25(1), but should arguably be read into the section. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 227-228.

⁸² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100, where the Court identified the two sub-components of arbitrariness. The sub-components are not expressly identified in the text of the Constitution, but the *FNB* interpretation was accepted in subsequent case law. See for example *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 34.

⁸³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 60, 100. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 220-223, 237-241.

more substantive, proportionality test.⁸⁴ *FNB* indicated that a deprivation will be substantively arbitrary if there is insufficient reason for the deprivation.⁸⁵ The Court listed several factors that should be considered when determining whether there was sufficient reason.⁸⁶ The arbitrariness test is contextual and the level of scrutiny (“the thickness of the test”) will vary depending on the specific context of each case.⁸⁷ Each of these requirements is discussed in more detail below.

3 3 2 3 Law of general application

Section 25(1) expressly states that no person may be deprived of property except in terms of law of general application. This requirement aims to give effect to the rule of law and the general legitimacy principles of the new constitutional dispensation.⁸⁸

Van der Walt indicates that the phrase “law of general application” (as opposed to “a law of general application”) ensures that regulatory deprivation of property is legitimately authorised by the common law, customary law or legislation.⁸⁹ A second implication of the

⁸⁴ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 237-238.

⁸⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 50, 60, 100(g). Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 243, 245.

⁸⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(a)–(h).

⁸⁷ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 246; Roux T & Davis D “Property” in Cheadle MH, Davis DM & Haysom NRL (eds) *South African constitutional law: The bill of rights* (2nd ed 2013) 20-1 – 20-28 at 20-21.

⁸⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 232.

⁸⁹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 234 identifies neighbour law as an area of common law that serves the state’s police power to promote and protect health and safety.

absence of the indefinite article in the phrase is that the focus of a constitutional challenge falls to the law that authorises the action, instead of the action itself.⁹⁰

Because of the wording of this requirement, deprivations can only be effected by the state. For section 25 purposes, a private party cannot legitimately deprive another person of their property.⁹¹ However, the interpretation of “law of general application” is wider than merely legislation that provides for state regulation, and will also include legislative regulations, subordinate legislation, municipal by-laws, rules of court, international conventions, the rules of common law and customary law.⁹² Accordingly, a deprivation is the result of law that authorises certain conduct or effects.

This point can be illustrated with reference to *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union*.⁹³ The case dealt with the question whether the disturbance caused by striking workers inside a shopping mall unlawfully infringed the property rights of the owner of the mall or of the occupiers of shops in the mall.⁹⁴ The court attempted to balance the conflicting constitutional rights by limiting each right in an appropriate way.⁹⁵ Van der Walt argues that the focus of the court was erroneously placed on the actions of the workers, while it should have focused on whether or not law of general

⁹⁰ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 235; Woolman S & Botha H “Limitations” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 2 (2nd ed RS 5 2013) 34-1 – 34-136 at 34-47.

⁹¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 63.

⁹² Woolman S & Botha H “Limitations” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 2 (2nd ed RS 5 2013) 34-1 – 34-136 at 34-51; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 233-234; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 545.

⁹³ [2010] ZAKZDHC 38 (3 September 2010). Hereafter referred to as *Growthpoint*. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 235.

⁹⁴ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* [2010] ZAKZDHC 38 (3 September 2010) para 1; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 235.

⁹⁵ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* [2010] ZAKZDHC 38 (3 September 2010) para 1; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 236.

application authorised their actions. The actions of the workers as such could not constitute a deprivation; if there was a deprivation of property for purposes of section 25(1), it would result from authorising law of general application that allows for the infringement of the applicants' property rights (for instance by authorising strikes) and only after that can it be determined whether or not the law in question authorised *arbitrary* deprivation of property.⁹⁶

Moreover, when the authorising law is considered, the courts must scrutinise whether the law in question in fact authorises the specific deprivation.⁹⁷ This question can easily be skipped over because of the “arbitrariness vortex” that Roux described, but Van der Walt cautions against overlooking the importance of this issue and argues that a reasonably strict scrutiny of the authorising law is appropriate.⁹⁸ This means that there must not only be a law, it must also provide authority for the outcome.⁹⁹

Insofar as the law must apply generally, commentators assert that although laws usually affect certain people but not others, the criteria for generality are that the law may not single out an individual or a select group of individuals in a legally unjustifiable manner.¹⁰⁰

⁹⁶ *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* [2010] ZAKZDHC 38 (3 September 2010) para 22-24; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 236.

⁹⁷ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 236.

⁹⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 237.

⁹⁹ See the discussion of *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) in Chapters 1 and 4, where I argue that there was no authority for the *ex lege* transfer of the excess land. The issue of authority should be considered in detail to ensure that there is law of general application that in fact authorises the action (and outcome) in question. This aspect of section 25(1) is closely connected to the principle of legality, which is discussed in more detail in Chapter 4.

¹⁰⁰ Woolman S & Botha H “Limitations” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 2 (2nd ed RS 5 2013) 34-1 – 34-136 at 34-48, 34-61. Woolman and Botha explain that law of general application must treat persons who are similarly situated alike and the same penalties or privileges must be awarded to similarly situated persons. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 232; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-21.

3 3 2 4 *Deprivation must be for a public purpose*

A further requirement for deprivation that is closely related to law of general application is that the deprivation must be for a public purpose or in the public interest.¹⁰¹ Section 25(1) does not expressly state that deprivations must be for a public purpose or in the public interest to be valid, but because section 25(1) asserts the police power of the state, and it is generally accepted that the police power is aimed at promoting and protecting public health and safety and similar police power public goals, this implicit requirement makes sense.¹⁰² However, the public purpose should be tested for and not just assumed.

Van der Walt is of the opinion that the public purpose requirement can be inferred from either one of the explicit requirements, namely that deprivation must be in terms of law of general application and non-arbitrary. From case law it is evident that the purpose of the deprivation is considered and can affect the standard of review that a court will adopt. In the *FNB* decision, for example, the Court engaged explicitly with the purpose of the law authorising the deprivation and concluded that effectively ensuring payment of tax debt was a legitimate public purpose and property could be regulated for that purpose.¹⁰³ When the purpose is not directly linked to the traditional purpose of police power regulation (namely public health and safety), a higher level of scrutiny might be employed by the court to make

¹⁰¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 219, 225, 227; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2005) 548.

¹⁰² Van der Walt AJ *Constitutional property law* (3rd ed 2011) 225, 227; Van der Walt AJ "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 122 *South African Law Journal* 75-89 81; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2005) 549.

¹⁰³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 228.

sure that the deprivation of property is justified.¹⁰⁴ However, the courts have not implemented this strategy uniformly, leaving some doubt as to the precise role of the public purpose requirement.¹⁰⁵

3 3 2 5 *Substantive arbitrariness*

Section 25(1) of the Constitution states that no law may permit arbitrary deprivation of property, but provides no further guidance to assist with the interpretation of the term “arbitrary”. Prior to *FNB*, academic opinion seems to have equated non-arbitrariness with rationality.¹⁰⁶ Roux explains that many academics looked to the Constitutional Court’s approach in *S v Lawrence*; *S v Negal*; *S v Solberg*¹⁰⁷ and concluded that non-arbitrariness in section 25(1) was the equivalent of the rationality requirement in section 9(1) of the Constitution.¹⁰⁸ However, this view was rejected by the Constitutional Court in *FNB*.¹⁰⁹

¹⁰⁴ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) paras 70-71 provides an example insofar as the Constitutional Court scrutinised the importance and purpose of section 89(5)(c) of the National Credit Act 34 of 2005 (namely to protect the public against unscrupulous lenders and to deter unregistered credit providers from extending credit) and held that it failed to provide sufficient reason for the deprivation.

¹⁰⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 228-231. Consider for example the engagement with the public purpose requirement in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32, where the public purpose was essentially the same as in the *FNB* case, but a much lower level of scrutiny was employed without much justification for the departure from the principles set out in *FNB*.

¹⁰⁶ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-21.

¹⁰⁷ 1997 (4) SA 1176 (CC).

¹⁰⁸ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-21.

¹⁰⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 98. Van der Walt AJ *Constitutional property law* (3rd ed 2011) 237 explains that the first requirement in section 25(1), namely that

FNB determined that substantive arbitrariness inquiries need not always involve exactly the same level of scrutiny.¹¹⁰ The appropriate test is located on a continuum between thin rationality review and thick proportionality review.¹¹¹ The point of departure is that a deprivation will be substantively arbitrary when the law of general application does not provide sufficient reason for the deprivation.¹¹² Ackerman J listed the considerations for evaluating “sufficient reason”:

“(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law

a deprivation must be authorised by law of general application, already ensures that deprivations cannot be aimed at specific persons in an arbitrary manner. It also establishes that the formal requirement that the deprivation must be properly authorised by valid law.

¹¹⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(g). Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 243.

¹¹¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 244 explains that the thick proportionality-type review endorsed in *FNB* falls short of the “full blown” proportionality test of section 36(1) of the Constitution. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 65.

¹¹² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 245. See also for example *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 39.

to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of the deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Where there is sufficient reason to warrant the deprivation is a matter to be decided on all the facts of each particular case, always bearing in mind that the enquiry is concerned with arbitrary in relation to the deprivation of property under s 25.”¹¹³

These considerations were applied in subsequent case law, although the outcomes were less predictable than one might have expected.¹¹⁴ *Mkontwana* was the first Constitutional Court decision to apply the *FNB* test. At first glance, it seems as though the court opted to apply the test exactly as suggested by Ackerman J in the *FNB* decision, but upon closer inspection the “subtle rephrasing” of the steps of the test brought about a shift in emphasis from the contextual factors, toward a more pronounced focus on the extent of the deprivation.¹¹⁵

¹¹³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹¹⁴ See, for example, *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 49.

¹¹⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 249; Van der Walt AJ “Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005)

Understood this way, the Court in effect established that the appropriate test (on the continuum between rationality and a proportionality-type test) is determined by the extent of the challenged deprivation. Since *FNB* it was always to be expected that the level of scrutiny might vary from case to case, but because the context in *FNB* and *Mkontwana* was very similar, the reason for the shift to rationality is not entirely clear.¹¹⁶

In *Reflect-All* the Constitutional Court again relied heavily on the *FNB* considerations and decided that proportionality-type review of the legislation that imposed significant restrictions on land that is affected by road planning legislation (which included determined routes as well as preliminary designs) was appropriate.¹¹⁷ The question was whether the relationship between the legislation in question, its objectives and the impact of the restrictions on the use, enjoyment and exploitation of the applicants' property constitutes sufficient reason for the deprivation. After considering the importance of protecting the historical plans for road schemes, and the alleged freezing effect that the restrictions had on the affected land, the majority of the Court held that proportionality-type review was appropriate and therefore the Court had to decide whether the means employed was proportionate to the ends.¹¹⁸ The majority held that the deprivation was not arbitrary, because

122 *South African Law Journal* 75-89 82-83. The relevance of the extent of a regulatory measure is discussed in more detail below.

¹¹⁶ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 250; Van der Walt AJ "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 122 *South African Law Journal* 75-89 82-83.

¹¹⁷ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 38-39, 48-49

¹¹⁸ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 49. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 259.

the applicants were not deprived of all their entitlements, nor were they entirely deprived of the use of their land and the means employed were not disproportionate to the ends.¹¹⁹

Roux argues that the *FNB* considerations may appear to be a step-by-step guide to determine future disputes, but on closer examination it appears that the Court retained for itself an almost absolute discretion to decide the outcome of future cases by varying the level of scrutiny that a contested deprivation is tested against.¹²⁰ The discretion is not itself a problem, especially because of the importance that the context plays in a deprivation dispute, but inconsistent exercise of the discretion in similar cases (such as *FNB* and *Mkontwana*) is problematic. In *Mkontwana* the Court indicated that certain factors, particularly the fact that the services for which the debt was incurred were delivered and enjoyed on the premises, established a sufficient nexus between property, debt and security right to justify a shift towards rationality. The question remains whether other factors, such as the purpose of the deprivation (ensuring payment of debt for municipal services) and the absence of a direct link between the owner and the debt should not have weighed heavier (as it did in *FNB*) to justify stricter review.

3 3 2 6 Procedural arbitrariness

The text of section 25(1) does not draw a distinction between substantive and procedural arbitrariness.¹²¹ However, the Constitutional Court indicated in *FNB* that a deprivation may

¹¹⁹ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 53-58.

¹²⁰ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-23.

¹²¹ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 88.

also be arbitrary if it is procedurally unfair.¹²² The Court gave no further indication regarding when a deprivation will be considered to be procedurally unfair.¹²³ The procedural aspect of arbitrariness was addressed in *Mkontwana*, where the Court stated that it had to be understood as a flexible concept that cannot be defined or interpreted without reference to the relevant circumstances.¹²⁴ Van der Walt suggests that the *Mkontwana* decision can be seen as an indication that the procedural fairness of a deprivation will be evaluated on a similar basis as the test for just administrative action.¹²⁵

In *Reflect-All* the question of procedural fairness was also addressed, but nothing new was added to what was previously decided in the *Mkontwana* decision.¹²⁶ The Constitutional Court also considered the requirements for procedural non-arbitrariness in terms of section 25(1) in *Opperman*.¹²⁷ The Court held that “judicial oversight” did not save a statutory provision from being procedurally arbitrary if it did not afford a discretion to the court when

¹²² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 88.

¹²³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 264.

¹²⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 65. This approach was also followed in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC). See Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 89-90.

¹²⁵ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 89. A fair procedure in the common-law context of administrative law is based on two rules of natural justice, namely the *audi alteram partem* rule and the *nemo iudex in re sua* rule. *Van Huyssteen NNO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) indicated that these rules are still central to procedural fairness in the constitutional context.

¹²⁶ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 44-47. See Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 90.

¹²⁷ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC).

making its decision.¹²⁸ This point was recently confirmed in *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others*.¹²⁹

Consequently, the independent role and content of procedural non-arbitrariness in terms of section 25(1) is questionable, since it seems to correspond exactly with the principles of procedural fairness in administrative law to ensure just administrative action.¹³⁰ The courts seem to apply administrative law principles to non-administrative action, with very little critical discussion of why this is appropriate in the constitutional context. According to Van der Walt this is problematic, at least upon first glance, since it seems unclear when, or why, a separate role for procedural fairness in terms of section 25(1) exists, especially since section 25(1) does not expressly mention procedural fairness as a requirement for constitutionally valid deprivations.¹³¹

The issue as to when the procedural fairness of a deprivation can be challenged in terms of section 25(1) and when PAJA must be used can be resolved by reliance on the subsidiarity principles.¹³² When the deprivation results from administrative action, PAJA should govern the dispute and must be utilised because it is constitutionally enacted legislation that aims to give effect to the right in the Bill of Rights that has a direct bearing on administrative justice, namely section 33. A litigant may not decide to bypass the provisions of PAJA in favour of direct reliance on section 25(1).¹³³ Thus, where administrative action brings about a

¹²⁸ *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 69.

¹²⁹ [2015] ZACC 15 (5 June 2015) paras 22-24.

¹³⁰ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 90.

¹³¹ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 91. The apparent overlap between constitutional property law and administrative law, where regulatory limitations are brought about by administrative action, is discussed in the next chapter.

¹³² The subsidiarity principles are set out in the Chapter 4.2.2.

¹³³ However, litigant is not precluded from challenging the constitutionality of any provision in PAJA. See Van der Walt AJ *Property and constitution* (2012) 35-37, 40-48.

deprivation, and the deprivation is alleged to be procedurally unfair, section 25(1) will have no role to play and the litigant must rely on the remedies provided by the appropriate legislation, in this case PAJA.¹³⁴ Where a deprivation results directly from law of general application and there is no administrative action involved, section 25(1) can be relied on directly to challenge the procedural fairness of the deprivation. Section 25(1) can thus only be used directly if there was no administrative action and PAJA has no role to play.¹³⁵

Roux addresses this issue without reference to subsidiarity principles and argues that because section 33 of the Constitution deals with administrative action rather than “law” as is required in section 25(1), there will generally be no overlap.¹³⁶ When administrative action deprives a person of property in a procedurally unfair manner, the matter will be challengeable under PAJA and when law provides for a deprivation of property in a procedurally unfair manner, section 25(1) will be applicable.¹³⁷ This corresponds with the

¹³⁴ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 91-92.

¹³⁵ In essence, this approach was confirmed in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 20, 30, although the constitutional challenge before the Court was not based on procedural arbitrariness. The majority of the Court held that the termination of pre-existing liquor licences occurred automatically through the imposition of a newly legislated regulatory regime. The offending provisions should therefore be challenged in terms of section 25(1) of the Constitution directly, and the provisions of PAJA have no role to play.

¹³⁶ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-25.

¹³⁷ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-25 correctly argues that the provisions of PAJA will apply to a matter if the procedural fairness of an administrative action is disputed, but in *Premier, Eastern Cape, and Others v Cekeshe and Others* 1999 (3) SA 56 (Tk) 103E-F the court acknowledged that where property rights are infringed by administrative action that was taken without an opportunity for a prior hearing, both the *audi alteram partem* rule and section 25 of the Constitution were (possibly) violated. See Roux T & Davis D “Property” in Cheadle MH, Davis DM & Haysom NRL (eds) *South African constitutional law: The bill of rights* (2nd ed 2013) 20-1 – 20-28 at 20-5.

conclusions drawn by Van der Walt, although Roux does not address the content of the procedural fairness requirement in the context of section 25(1).

Essentially it seems as though the principles to determine procedural fairness will be the same whether or not the state action was administrative action, especially since the relevant case law has relied heavily on the administrative law principles to evaluate the procedural fairness of a deprivation. However, the litigation route will differ and the distinction is important to ensure that the matter is correctly pleaded and dealt with on the appropriate basis, namely either section 25(1) or the relevant provisions of PAJA.

3 3 2 7 The relevance and role of section 36 of the Constitution

The Bill of Rights contains a general limitation clause in section 36. Normally, a constitutional challenge will involve a two-step process, where the first step is to determine whether a right in the Bill of Rights has been infringed, and the second step is to determine whether the infringement or limitation can be justified in terms of section 36.¹³⁸

Ackerman J stated in *FNB* that if a deprivation infringes or limits section 25 and the limitation cannot be justified by section 36, the matter is concluded. Thus, the Court did foresee that section 36 could possibly have a role to play in constitutional property disputes in terms of section 25(1), but did not expressly decide the matter.¹³⁹

¹³⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 75; 286-287. Van der Walt indicates that *FNB* arguably collapsed the first and second stage issues in the arbitrariness test, because the *FNB* methodology ensured that the first stage is already a substantive (as opposed to a formalistic or mechanical) inquiry into the validity and justification for the challenged deprivation. Also see Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-2 – 46-3; Woolman S & Botha H “Limitations” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 2 (2nd ed RS 5 2013) 34-1 – 34-136 at 34-3, 34-18.

¹³⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 58, 110.

Despite this indication in the *FNB* decision, there has been speculation by various authors regarding the precise role of section 36 with regard to a constitutional property dispute.¹⁴⁰ The point has been made that although it is technically possible for a deprivation that does not meet the requirements of section 25(1) to be justified in terms of section 36(1), it is unlikely because the requirements in terms of section 25(1) and 36(1) are very similar.¹⁴¹ A deprivation that is not authorised by law of general application will not be justifiable under section 36, since section 36(1) also requires a law of general application.¹⁴² Furthermore, section 36(1) requires limitations to be reasonable and justifiable in an open and democratic society, taking into consideration a list of factors that will evaluate whether or not a limitation is arbitrary. Consequently, it is difficult to imagine a situation where a deprivation that fails to meet the non-arbitrariness requirement of section 25(1) can be saved by section 36(1).¹⁴³

An *obiter* statement by the Land Claims Court addressed a hypothetical situation where state action was in conflict with section 25(1) that could be justified in terms of section

¹⁴⁰ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 285; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-26; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 271-272; Rautenbach IM “The limitation of rights in terms of provisions of the bill of rights, other than the general limitation clause: A few examples” 2001 *Tydskrif vir die Suid-Afrikaanse Reg* 617-641 621.

¹⁴¹ Rautenbach IM “The limitation of rights in terms of provisions of the bill of rights, other than the general limitation clause: A few examples” 2001 *Tydskrif vir die Suid-Afrikaanse Reg* 617-641 634; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 219. One notable difference is that the proportionality-type review in terms of section 25(1) falls short of full proportionality review, while the section 36 test constitutes full proportionality review.

¹⁴² Van der Walt AJ *Constitutional property law* (3rd ed 2011) 219; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-26.

¹⁴³ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 219; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 108. Also see *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 75 where the Court indicated that many of the factors considered in the arbitrariness test are repeated in section 36(1).

36(1).¹⁴⁴ The court considered whether the statutory obligation imposed on a landowner by the Extension of Security of Tenure Act 62 of 1997 to allow an occupier to appropriate a gravesite on the property without compensation could be reasonable and justifiable in terms of section 36 even if it were considered to amount to arbitrary deprivation in terms of section 25(1). However, because the court found that there was no arbitrary deprivation of property, the value of the statement is limited and the issue remains open.¹⁴⁵

Section 25(1) is predominately about ensuring that deprivations are lawful, procedurally fair and reasonable, which confirms that the exercise of the police power is constitutionally valid and justified.¹⁴⁶ The *FNB* methodology represents one way of approaching cases dealing with deprivation of property. Although the *FNB* methodology is subject to criticism and has certain shortcomings or potential pitfalls, it offers a framework for testing regulatory measures against the constitutional requirements set out in section 25(1).

3 4 An analysis of limitations¹⁴⁷

3 4 1 New or extended regulation of vested or exercised rights

The question of when the act of regulation constitutes a deprivation in terms of section 25(1) is considered in more detail in this section. The restrictions that are imposed on property through regulatory action such as town planning, development and environmental

¹⁴⁴ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 35.

¹⁴⁵ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 31. Also see the discussion by Van der Walt AJ *Constitutional property law* (3rd ed 2011) 286.

¹⁴⁶ The law of general application requirement constitutes lawfulness, and the interpretation of “arbitrary” as comprising of both a procedural and substantive components constitute procedural fairness and reasonableness, respectively. From this, a potential overlap with section 33 of the Constitution is evident, and I explore the area of overlap in Chapter 4.

¹⁴⁷ “Limitations” is the preferred term in the literature to discuss non-specific or generic restrictions imposed on property.

conservation law offer particularly interesting examples and have led to various constitutional challenges in terms of the property clause, which I discuss below.

The objective of constitutional protection of property rights differs fundamentally from private-law protection, insofar as constitutional protection is aimed at achieving an appropriate balance between private rights and the public interest in “the regulation of the property regime”, rather than only focusing on the protection of individual rights.¹⁴⁸ Thus, despite the constitutionalisation of property, vested rights are subject to various regulatory limitations, some of which may severely affect the rights of the rights holder.¹⁴⁹ The question here is not whether a government has the power to regulate the use of property but rather the extent to which the state can regulate vested rights and what the consequences of regulation are.¹⁵⁰ Vesting of rights is an important issue in constitutional law, because traditionally,

¹⁴⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 91. As mentioned previously, the position seems to be that “property” in terms of section 25 will be interpreted more generously than the traditional concept of ownership in the context of private law. See for example *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 56-57; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 85-86. Despite this generous approach, there are still situations where it is unclear whether a particular right will be protected as property in terms of section 25(1). One example is intangible commercial property, such as licences or quotas. American literature is valuable in this regard, since much has been written on the notion of constitutional property and so-called “new property” and investment-backed expectations. See in this regard Michelman FI “Property as a constitutional right” (1981) 38 *Washington and Lee Law Review* 1097-1114; Reich C “The new property” (1964) 73 *Yale Law Journal* 733-787. In South Africa it might not be necessary to venture too deeply into this debate for two reasons: firstly, the Constitutional Court has indicated that a generous interpretation of “property” is appropriate and secondly, many of these intangible interests may be protected more easily under other provisions in the Bill of Rights. Consider for instance *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC). However, liquor licences were accepted as property for purposes of section 25(1) in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 5.

¹⁴⁹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 91.

¹⁵⁰ Baron JB “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-967 942 indicates that within the space demarcated by the limits of constitutional protection, the state is free to exercise its regulatory powers legitimately, even if it seemingly infringes individual freedom.

vesting is regarded as “something that prompts the recognition of the right.”¹⁵¹ Vesting is a condition for constitutional protection in terms of section 25(1), meaning that only vested rights qualify as property for constitutional purposes.¹⁵²

The favoured position seems to be a general (although vague) acceptance of the theory that property rights are inherently limited in the constitutional context, although the exact scope of these limitations is not fixed or clear.¹⁵³ The fact of lawful limitation is accepted, but the scope or content of the limitation varies and must comply with constitutional requirements.

Agri South Africa is an example of a difficult category of regulation where the regulatory measures amount to a regime change that either destroys or reduces existing and vested rights substantially.¹⁵⁴ In *Agri South Africa* both parties agreed that the new regulatory scheme that regulates the mining industry in South Africa amounted to non-arbitrary deprivation of property and therefore the antecedent question of whether such a regime change actually constitutes a deprivation was not considered in detail by the Court.¹⁵⁵ However, *Agri South*

¹⁵¹ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 123.

¹⁵² *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 123 where Moseneke DCJ’s separate (but concurring) judgment diverges from the majority opinion, holding that a liquor licence does not vest in its holder and that the vesting issue is one of the considerations to assess whether a public law right ought to be treated as property.

¹⁵³ See for example *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 106, where O’Regan J, in her minority judgment, clearly states that landowners do not have the right to develop their land as they wish, since their rights are necessarily limited by “the rights of the broader community”.

¹⁵⁴ Badenhorst PJ & Olivier NJJ “Expropriation of ‘unused old order rights’ by the MPRDA: You have lost it!” (2012) 75 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 329-343 329. The new regime was introduced by the Mineral and Petroleum Resources Development Act 28 of 2002.

¹⁵⁵ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 24; 53. This issue has enjoyed attention in German law and is revisited in section 3.6 below.

Africa illustrates the point that the state may, subject to the requirements for a valid deprivation, extinguish or amend existing rights, if the public purpose is sufficiently important to justify such an extreme measure.¹⁵⁶

Another recent example of this type of regulation is *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others*.¹⁵⁷ Interestingly, the Court engaged extensively with the question whether Shoprite's liquor licence constitutes property for purposes of section 25(1) of the Constitution and pointed out that licences do not necessarily fit into the private law conception of property. Before the advent of the Constitution, state-granted interests such as licences were only recognised once vested, and even then would only be awarded procedural protection in terms of administrative law principles.¹⁵⁸ The majority of the Court held that the constitutional notion of property was wide enough to include liquor licences, and focused on whether or not the statutory regime change that was introduced by the Eastern Cape Liquor Act¹⁵⁹ arbitrarily deprived the appellant of its property.¹⁶⁰

The constitutional protection of property includes protection of use rights in respect of land, which includes use rights that have been acquired and exercised lawfully, as well as existing uses that are unlawful only in the formal sense and uses which have been acquired

¹⁵⁶ *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC). This approach corresponds with the decision of the US Supreme Court in *Miller v Schoene* 276 US 272 (1928) at 277-279 where the Court indicated that the state may destroy the value of property without compensation if there is a sufficient public interest, although the facts of the two cases were very different. See also Underkuffler LS "Property and change: The constitutional conundrum" (2013) 91 *Texas Law Review* 2015-2037 2020.

¹⁵⁷ [2015] ZACC 23 (30 June 2015).

¹⁵⁸ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 59.

¹⁵⁹ 10 of 2003.

¹⁶⁰ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 73-86.

but not yet exercised.¹⁶¹ Generally, it is accepted that a landowner cannot expect that even vested and exercised rights should remain precisely the same or unaffected by regulation forever.¹⁶² However, it is not always clear what the scope and limits of possible future regulatory developments are and our view of what a deprivation is and when a deprivation occurs might need to adapt according to social, political and economic changes in society.¹⁶³

The influence of a dynamic regulatory regime on vested or exercised rights can be illustrated by using the example of building regulations.¹⁶⁴ Almost everyone will agree that landowners' right to build on their land is subject to building regulations, thus accepting that certain undefined and unspecified limitations are inherent to the right, to the extent that all owners must have approved building plans before they may develop their land. However, the exact content and scope of the building regulations that can be imposed and the impact or retrospective effect of new building regulations might be contested.

The point of departure is that property is not free from risk, and this includes the risk that the value of the property might be affected by future regulatory developments or policy changes.¹⁶⁵ There are often extensive lapses in time between the purchase of land, obtaining approval for development and implementation of the approved plans. *Oudekraal Estates (Pty)*

¹⁶¹ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 154.

¹⁶² Michelman argues convincingly that a higher-law scheme (such as the Constitution, in the South African context) should not include rules that will entrench "historically extant property distributions against normative correction by political means". See Michelman FI "Socio-political functions of constitutional protection for private property holdings (in liberal political thought)" in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 433-450 449. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 313.

¹⁶³ For an exposition of how environmental regulation can affect property rights, see in general Gray K "Can environmental regulation constitute a taking of property at common law?" (2007) 24 *Environmental and Planning Law Journal* 161-181.

¹⁶⁴ The constitutional effect of building regulations is discussed briefly in Van der Walt AJ *Constitutional property law* (3rd ed 2011) 289-296.

¹⁶⁵ Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 313.

*Ltd v City of Cape Town and Others*¹⁶⁶ can serve as an illustration of the complicated problems that can arise after the approval of plans by the local authority. The simplified facts of *Oudekraal (2010)* were that plans for the development of a township on the slopes of Table Mountain were approved in 1961 (despite omitting or disregarding the presence of important Muslim graves on the land), but the property was not developed. Then in 1996, engineering plans were submitted to develop the property. The City of Cape Town alleged that the 1961 approval had lapsed because the appellant (Oudekraal Estates) failed to submit general plans for development on time, and extensive litigation followed.

In *Oudekraal (2010)* the Supreme Court of Appeal held that although it could condone the delay of the applicant, allowing the decision to grant approval for development to stand would have undesirable consequences for the Muslim community as well as threaten an environmentally significant area.¹⁶⁷ The appellant's entitlement to develop the land was in effect limited 50 years later, because of changed circumstances.¹⁶⁸

In the *Oudekraal (2010)* decision, the limitation on the entitlement to develop the property was justified by changing circumstances, and considering the long period of time that lapsed between the first approval and the subsequent limitation, the amended regulatory scheme could seem less controversial. However, a similar limitation can be imposed even shortly after property was obtained for development purposes. The US case of *Lucas v South*

¹⁶⁶ 2010 (1) SA 333 (SCA). Hereafter referred to as *Oudekraal (2010)*, to distinguish between the 2010 decision of the Supreme Court of Appeal ("SCA") and the 2004 decision that was also handed down by the SCA on a different point.

¹⁶⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA). Also see Du Plessis E "To what extent may the state regulate private property for environmental purposes? A comparative study" 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 512-526 514.

¹⁶⁸ Du Plessis E "To what extent may the state regulate private property for environmental purposes? A comparative study" 2011 *Tydskrif vir die Suid-Afrikaanse Reg* 512-526 514. See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 (1) SA 333 (SCA) para 8.

*Carolina Coastal Council*¹⁶⁹ is such an example from the United States. In the *Lucas* decision a purchaser bought two lots on a barrier island in 1986, at a time when the lots were zoned for single-family residential purposes. In 1988, merely two years later, the state enacted legislation that prohibited the erection of permanent habitable structures on the lots.¹⁷⁰ The owner argued that the legislation had the effect of a taking because of the “complete extinguishment of the value of the property”.¹⁷¹

Michelman argues that where a regulation is clearly in pursuance of public health or safety goals, there is no diminution of property holdings.¹⁷² This logic applies even when the loss caused by regulatory development is severe, such as in *Lucas* where the amended regulatory scheme had the effect of making the land in question economically worthless.¹⁷³ In the *Lucas* case the Supreme Court of the United States indicated its qualified acceptance of the implied limitation of the police power principle with regard to land but not insofar as it would allow the state to eliminate all economically valuable use of land.¹⁷⁴ The Court stated that confiscatory regulations (regulations that prohibit all economically valuable use of land) are

¹⁶⁹ 505 US 1003 (1992). Hereafter referred to as *Lucas*.

¹⁷⁰ *Lucas v South Carolina Coastal Council* 505 US 1003 (1993) 1005-1010.

¹⁷¹ *Lucas v South Carolina Coastal Council* 505 US 1003 (1993) 1009. A “taking” in US law is wider than “expropriation” in other jurisdictions, and includes both “expropriations” and “regulatory takings” (regulatory measures that go too far). See Van der Walt *AJ Constitutional property clauses: A comparative analysis* (1999) 399.

¹⁷² Michelman FI “Construing old constitutional texts: Regulation of use as ‘takings’ of property in United States constitutional jurisprudence” in Smith E (ed) *Constitutional justice under old constitutions* (1995) 227-250 242. Michelman indicates that the term “implied limitation” was used by Justice Holmes in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922). The *Pennsylvania Coal Co v Mahon* decision was extremely influential, partly because it recognised the wide-ranging powers of the state to regulate property, and partly because it established that a regulation that “goes too far” will be regarded as a taking. See Van der Walt *AJ Constitutional property clauses: A comparative analysis* (1999) 401.

¹⁷³ Michelman FI “Construing old constitutional texts: Regulation of use as ‘takings’ of property in United States constitutional jurisprudence” in Smith E (ed) *Constitutional justice under old constitutions* (1995) 227-250 242.

¹⁷⁴ *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) 1027-1029.

so severe that such a regulation cannot be newly legislated or decreed, unless compensation is provided. Where the regulation is not subject to compensation, the Court indicated that the limitation had to “inhere in the title itself” in the “background principles” of the state’s law of property and nuisance that was already imposed on property.¹⁷⁵ Upon this construction the now expressly unlawful action was always unlawful and the state always had the option to make this implied restriction explicit.¹⁷⁶

Michelman raises the question whether the background principles that the Court refers to are static or evolving, and if they are regarded as evolving, how the content is determined at a specific time.¹⁷⁷ The answers to these questions are not clearly provided in the *Lucas* decision, and the remarks of the majority that the legislature may not deprive an owner of the only economic use of his property without compensation unless the background principles so dictate, do little to predict the outcome in similar future cases.¹⁷⁸ The *Lucas* decision illustrates one of the numerous issues that arise when there is regulation of vested rights.¹⁷⁹

¹⁷⁵ *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) 1029. See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 453, arguing that the reference to background state law, and the implication that the content of property rights is determined by existing principles, resembles the German *Immanenztheorie*. The *Immanenztheorie* is discussed in more detail in Chapter 2.3.5.

¹⁷⁶ *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) 1030.

¹⁷⁷ Michelman FI “Construing old constitutional texts: Regulation of use as ‘takings’ of property in United States constitutional jurisprudence” in Smith E (ed) *Constitutional justice under old constitutions* (1995) 227-250 248-249. Michelman points out that it is vague and uncertain what the courts will regard as “conclusive evidence” of the evolved content of the background rules.

¹⁷⁸ Michelman FI “Construing old constitutional texts: Regulation of use as ‘takings’ of property in United States constitutional jurisprudence” in Smith E (ed) *Constitutional justice under old constitutions* (1995) 227-250 250. Also see Underkuffler-Freund LS “Takings and the nature of property” (1996) 9 *Canadian Journal of Law and Jurisprudence* 161-205 198.

¹⁷⁹ Also see the discussion by Gray K “Can environmental regulation constitute a taking of property at common law” (2007) 24 *Environmental and Planning Law Journal* 161-181 177-178.

In the *Lucas* decision, architectural plans had been drawn up, although the plans had not been submitted or approved at the time that the dispute commenced. In the *Oudekraal* (2010) decision there were approved plans, but the considerable time lapse and consequent changed circumstances justified the amendment of that entitlement. In *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others*¹⁸⁰ the court was faced with an application for an interdict to prevent a Local Council from approving building plans that had already been submitted by property developers to obtain permission to build a shopping centre on a piece of land.¹⁸¹ The attorneys of the developers insisted that the Municipality comply with section 7(1) of the National Building Regulations and Building Standards Act, which requires that the local authority approve or reject submitted building plans within 60 days.¹⁸² However, the court decided in favour of the applicants to grant the interdict, based on the prejudice that would accrue to the applicants if they were not afforded the opportunity to influence the modification of the scheme before the building plans were approved.¹⁸³

In a counter-application, the developers challenged the constitutionality of section 48(1) of the Town Planning Ordinance 27 of 1949, which provides for the modification of the town

¹⁸⁰ 2002 (2) SA 589 (N). Hereafter referred to as *Colonial Development*.

¹⁸¹ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 595.

¹⁸² National Building Regulations and Building Standards Act 103 of 1977. In a letter to the Local Authority, Colonial Developments' attorneys insisted that "[h]aving lodged the plans, our clients have a right to have them approved if they comply with the provisions of the applicable laws as they currently stand." See *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 596.

¹⁸³ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 602.

planning scheme by the Council.¹⁸⁴ The provision was challenged on the basis of infringing the right to just administrative action (section 33) and the right to property (section 25). The court found that there was no undue limitation of the right to just administrative action with regard to the argument that the developers' right to be heard was limited by section 48 of the Ordinance. Moreover, the court found that the appeal envisioned in section 48 did not constitute administrative action, and therefore the constitutional attack on that ground also had to fail.¹⁸⁵ The developers contended that their right to develop the property (in accordance with the requirements of the approved town planning scheme in force *at that time*) constitutes a proprietary right of which they would be arbitrarily deprived through the mechanism for modification of the scheme that section 48(1) of the Ordinance provided.¹⁸⁶ Therefore, the developers challenged the modification on the basis that it constituted an arbitrary deprivation of property. The challenge was based on two grounds. Firstly, the modification could be ordered without affording them an opportunity to state their case and there was no opportunity for appeal against the decision.¹⁸⁷ Secondly, the developers alleged that the provision allows the commission to "remove" rights in property without compensation.¹⁸⁸

¹⁸⁴ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 602-610.

¹⁸⁵ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 610.

¹⁸⁶ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 610.

¹⁸⁷ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 610. Although not expressly classified as such, this would constitute grounds of procedural arbitrariness. The court declined to address these concerns and held that these matters were addressed when dealing with the question of just administrative action.

¹⁸⁸ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 610.

The court held that the right to use or develop property is not absolute since it is subject to various statutory measures to promote health, safety, order, amenity, convenience and general welfare. Furthermore, the court remarked that “the position would have been no different if they had bought the property well knowing that it was subject to the provisions of the scheme.”¹⁸⁹ Thus, the entitlements of the developers were subject to the applicable regulatory scheme, which included the further qualification or restriction that their rights might possibly be amended in terms of section 48 of the Ordinance. A regulatory scheme can therefore be modified after purchase and even after the submission of plans (but before approval) without arbitrarily depriving a person of rights in property.¹⁹⁰ The decision does not clearly indicate whether a modification of the regulatory scheme actually constitutes deprivation in terms of section 25(1), as opposed to viewing it as a manifestation of an inherent limitation on the right to build. The court merely stated that *dominium* is generally the most comprehensive right of enjoyment or use of the property, but it was never absolute. The court listed some examples of the different ways in which ownership is limited, one of which is that the development of property is subject to town planning measures. This case shows that in the constitutional context, the inherent/external limitation debate is of limited value. If property rights are constitutionally framed-rights that are held and exercised within a constitutional legal system, regulation of the use of property is inherent to the system (as opposed to necessarily being inherent to the individual right), and is in principle constitutionally justified. In the constitutional context, the focus falls on the constitutional requirements for valid regulation, and on justification for the effects of the regulation, but not on the content and scope of the right as a bar to regulatory action.

¹⁸⁹ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 611.

¹⁹⁰ *Colonial Development (Pty) Ltd and Others v Outer West Local Council and Others; Bailes and Another v Town and Regional Planning Commission and Others* 2002 (2) SA 589 (N) 610-612.

An interesting example of a case that dealt with the effects of regulation came before the Supreme Court of Appeal in *City of Johannesburg v Engen Petroleum Ltd and Another*.¹⁹¹ The Court held that a vertical diversion of a road was the kind of road change that affects adjacent landowners, lessees and occupiers in such a way that compensation ought to be paid in terms of section 67(4) of the Local Government Ordinance 17 of 1939. The purpose of this provision is to compensate property owners, lessees or occupiers who suffer pecuniary loss (such as the loss of business opportunities) because of changes to an adjacent road. This case shows that where the effects of regulatory measures are severe, legislation can provide for compensation to be paid to lessen the burden on affected rights holders.¹⁹² This case also shows that the legislature wanted to be able to change road structures when needed and would rather pay compensation than allow the right-holder to insist that the previous situation be continued or reinstated. Regulation of the use of property is therefore a systemic mechanism that the state uses to fulfil its regulatory function.

The Constitutional Court recently confirmed once again that the checks on regulatory deprivation should not make it impossible for the state to fulfil its regulatory functions.¹⁹³ In the main judgement in the *Shoprite* case, Froneman J emphasised that “entitlements of the past do not necessarily warrant protection in perpetuity, provided that appropriate and

¹⁹¹ 2009 (4) SA 412 (SCA).

¹⁹² Although it was not referred to in the decision, the principles of the German *Anliegerrecht* and *Situationgebundenheit* come to mind in this context, and could be useful to explain the wide interpretation that was given to the term “diversion” in this case, in order to compensate affected parties for their losses. See Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (2015) Chapters 3.2 and 4.2.

¹⁹³ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 19, 25; *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) para 83. A similar statement was made by Holmes J in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413 that the state cannot fulfil its regulatory function properly if it is expected to, for example, pay compensation for every change in the law.

reasonable transitional provisions are made.”¹⁹⁴ The state cannot be expected to compensate owners for every change in the law simply because an owner suffers a loss because of regulatory action. This applies particularly to instances where amended or new regulatory schemes affect vested or exercised rights. The point is made clearest in German constitutional law insofar as the point of departure is that the state is not forced to either desist or pay compensation when fulfilling its regulatory function.¹⁹⁵ This is so even when the state regulates in a way that affects existing rights detrimentally. Having said that, regulatory action can be challenged for its unjustifiably unfair effects in the constitutional system. To avoid a finding of invalidity the regulatory authority will therefore have to consider strategies to ameliorate the negative effect of new or amended regulatory schemes on existing rights, which would include measures such as interim measures (exceptions and special arrangements), non-retrospective effect of the new or amended scheme or regulatory compensation.¹⁹⁶

3 4 2 *The relevance of the source of the limitation*

Limitations on property can be imposed *ex lege* (through direct, *ex lege* effect of the principles of the common law, legislation or the Constitution) or by acts of the administration, the executive or the judiciary. The source of the limitation might be relevant for two reasons. Firstly, depending on the source of the regulation, the regulation itself is regulated on the basis of the Constitution, legislation or the common law and this secondary regulatory process can take place in administrative law or constitutional property law.

¹⁹⁴ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 51.

¹⁹⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 214.

¹⁹⁶ Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (2015) Chapter 4.1 and 4.2.

Secondly, the source of the limitation (and the corresponding field of law) can influence the level of scrutiny that a court will employ to test the validity of the regulation.¹⁹⁷

Blaauw-Wolf and Wolf distinguish between various categories of limitations that can legitimately be imposed on fundamental rights.¹⁹⁸ Firstly, property rights are limited by the rights and interests of third parties, which is referred to as limitation on a horizontal level.¹⁹⁹ However, since the rights and interests of third parties are acknowledged and enforced through state recognition of their validity (therefore in effect adding a public law element to these instances of “horizontal” limitation) limitation is never a purely private law matter.²⁰⁰ Furthermore, it is inaccurate to say that the rights or interests of third parties can directly cause a deprivation (whether constitutionally valid or otherwise) in the constitutional sense. Constitutionally valid deprivations can only be effected through law of general application.

Property rights are limited by the state through regulatory measures imposed by legislation. This is an instance of vertical limitation, and the exercise of this power of the state is often referred to as its “police power”. Many of these regulatory limitations are imposed by administrative action – the area of overlap between property and the right to just administrative action is discussed in more detail in the next chapter. However, some regulatory measures and subsequent deprivations are imposed directly by legislation, without the involvement of an administrator. In these cases the statutory provision brings about a deprivation directly or by operation of law, usually after the occurrence of a trigger event

¹⁹⁷ The secondary regulatory process is discussed in more detail in Chapter 4.

¹⁹⁸ Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) 113 *South African Law Journal* 267-296 271-272.

¹⁹⁹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 579.

²⁰⁰ Murphy J “Property rights in the new constitution: An analytical framework for constitutional review” (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 623-644 630.

provided for in the legislation.²⁰¹ These are the cases that presumably stand to be adjudicated under section 25(1) of the Constitution, because administrative law will not be applicable to these cases.²⁰²

Property rights can also be limited directly by other fundamental rights that are protected in the Bill of Rights.²⁰³ Limitations that are imposed because of the fundamental rights of other persons are especially important in South Africa's constitutional context. There has been considerable engagement with what the new constitutional framework means for purposes of accommodating competing rights and interests, which has the effect of limiting property rights. The courts have engaged quite extensively with the relationship between property rights and other constitutionally protected rights in the housing and eviction context.²⁰⁴ In post-apartheid South Africa, the right of an owner to evict persons from her property can no longer be seen as an absolute entitlement. Section 26(3) of the Constitution and anti-eviction legislation enacted to give effect to it specifically aim to curtail the power of owners by limiting the circumstances in which an eviction order can be obtained, in order to give effect to the non-property fundamental rights of occupiers.²⁰⁵

²⁰¹ Examples from case law of direct statutory deprivations include *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC); *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC).

²⁰² This point was confirmed in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 20.

²⁰³ See for example *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C).

²⁰⁴ See for example *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); Mostert H "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *South African Law Journal* 238-273 258.

²⁰⁵ Examples of important eviction legislation include the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and the Extension of Security of Tenure Act 62 of 1997. See also Mostert H

However, housing-rights for purposes of section 26 of the Constitution are mediated by legislation enacted to give effect to the relevant right, which means that it is not a true example of direct constitutional limitation. Arguably, the only valid examples are the right to life and dignity, both exemplified in how the court construed the beggars' rights in *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)*.²⁰⁶ The court held that the right to life includes the right to livelihood, and that "[t]he issue of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent."²⁰⁷

The question arises whether the level of scrutiny will differ depending on the source of the limitation.²⁰⁸ The answer, at least in South African law, is not yet entirely clear. It is possible that courts will show a greater level of deference to a limitation that is imposed directly by other constitutionally protected non-property rights or when the democratically-elected legislature imposed a regulatory limitation through legislation, than they will afford limitations resulting from the common law or administrative law, and consequently employ a lower level of scrutiny.²⁰⁹ In the case of direct constitutional limitation (by the right to life or

The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany (2002) 393. In German law the preferred approach of the Federal Constitutional Court is to "optimise" each right by giving partial protection to each right without completely sacrificing either one. This approach is preferred over a hierarchical approach where precedence is afforded to one right above another. See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 160.

²⁰⁶ 2004 (4) SA 444 (C).

²⁰⁷ *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 448.

²⁰⁸ Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15-106 44-84.

²⁰⁹ Deference is a controversial topic in constitutional law and especially in administrative law, and it is heavily debated in the literature. However, the debate falls outside the scope of this study. Refer to Maree PJM *Investigating an alternative administrative-law system in South Africa* (2013) 75-114 for an overview of

dignity) there is arguably no deprivation and thus no section 25(1) test. In cases where there is legislation giving effect to other constitutional rights, rationality review is arguably very likely because of the purpose of the deprivation to fulfil a direct constitutional obligation.²¹⁰

3 4 3 *The relevance of the extent of the limitation*

The relevance of the extent of limitations is discussed in case law, although a uniform approach is not consistently followed. For example, *Mkontwana* applied a slightly adapted version of the *FNB* arbitrariness test when the Court focused its attention on the extent of the deprivation, instead of the interrelated factors that were introduced in *FNB* to determine arbitrariness.²¹¹ According to the Court, whether or not there has been a deprivation will depend on the extent of the interference with or limitation of the use, enjoyment or exploitation of the property.²¹²

The Court indicated that the right to alienate property is an important incident of ownership and that the effect of the legislative restrictions was that the property could not be

deference in the administrative law context. Also see Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 44-84 on the argument that deference (in the form of the standard of scrutiny) is determined by the constitutional legal system. I return to this point in Chapter 4.

²¹⁰ Examples of this category can arise from tension between property and the right to equality, where the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 may cause a deprivation of property or from tension between property and labour rights, where the Labour Relations Act 66 of 1995 can have an impact on property rights. Because of the important constitutional purposes that these statutes serve, rationality review would arguably suffice to satisfy the section 25(1) requirement for non-arbitrary deprivation.

²¹¹ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman’s The law of property* (5th ed 2005) 548.

²¹² *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32.

transferred until all consumption charges due to the Municipality had been paid.²¹³ The Court held that this could have serious implications and therefore the restriction or interference did “give rise” to a deprivation of property.²¹⁴ Thus, the extent of the regulatory measure is important to establish whether a deprivation has occurred and if so, to determine the appropriate level of scrutiny that is required.²¹⁵

In the *Reflect-All* decision the Constitutional Court reiterated that the extent of the regulatory limitation is important to determine whether there was a deprivation and that the extent of the deprivation will influence the level of scrutiny to determine whether “sufficient reason” exists for the deprivation.²¹⁶ Where the deprivation is marginal, rationality will often be the appropriate level of scrutiny, as opposed to instances where the deprivation is severe or extensive, in which case proportionality-type review might be necessary.²¹⁷ The extent of the limitation is therefore closely connected to the justification that is required for the effects of the limitation.

The extent of the effects of the regulation might also be relevant in a less obvious way. The *FNB* decision indicated that expropriation is a subsection of deprivation, meaning that

²¹³ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 33.

²¹⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 33.

²¹⁵ Van der Walt AJ “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 122 *South African Law Journal* 75-89 81.

²¹⁶ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 49; 53; 98.

²¹⁷ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 49; 53; 98.

deprivation is the broader category that encompasses expropriation. In this sense, expropriation is a specific type of deprivation that must meet additional requirements. Roux points out that, conceptually, expropriation is the most severe form of deprivation.²¹⁸ Accordingly, expropriation is a specific type of state limitation that can be imposed on property, which must meet certain requirements to be valid. The fact that compensation is (usually) required for expropriation is indicative of an acknowledgement that where the restriction imposed on property is very extensive (as is the case with expropriation) it is reasonable to compensate the owner for the loss.²¹⁹ This does not mean that property is not subject to the inherent risk of possible expropriation, but rather that the inherent limitation includes the expectation that where the risk of expropriation realises, it will be accompanied by payment of compensation.²²⁰

An interesting question regarding the effect of continuing threats of and unsuccessful attempts at expropriation on the rights of a property holder was considered in *Offit Enterprises*. The Constitutional Court held that section 25(1) had a role to play where there was a “substantial interference”, a benchmark that is context specific.²²¹ The Court indicated that physical or direct interference is not necessarily required and that when a determination must be made, courts should pay attention to the extent to which the use, enjoyment and

²¹⁸ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-19.

²¹⁹ Section 25(3) of the Constitution requires that just and equitable compensation be paid when the state expropriates property. In exceptional circumstances, it might be possible that a court finds that just and equitable compensation in a specific case amounts to no compensation. For a more detailed discussion, see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 517-519.

²²⁰ Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-19.

²²¹ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) paras 39, 41.

exploitation of the property is curtailed or diminished.²²² On the facts of the particular case, the Constitutional Court found that there was no deprivation of property, because although the actions of the respondents inconvenienced the applicants, they did not “amount to a substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment”.²²³ The Court’s words indicate that some restrictions or limitations on the use and enjoyment of property must be accepted, without thereby constituting a deprivation of property within the meaning of section 25(1). This is very close to the arguments in favour of the *Immanenztheorie* in German law, to support the view that rights are inherently limited in the constitutional context. While the *Immanenztheorie* is in line with constitutional jurisprudence, it does not address all the issues that arise from property and regulation, and it is more useful to view the limitations as an inherent part of the system, as opposed to the right. I return to this argument below.

An analysis of limitations in the constitutional context highlights problematic aspects of the regulation of the use of property that have not been conclusively addressed in South African law. Although the emphasis on the importance of the extent of the limitation has not been uniform, the case law indicates that extent will play a role to determine whether the action amounts to a deprivation,²²⁴ and if it does, to assess its constitutional validity.²²⁵ In

²²² *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 41. Also see Roux T & Davis D “Property” in Cheadle MH, Davis DM & Haysom NRL (eds) *South African constitutional law: The bill of rights* (2nd ed 2013) 20-1 – 20-28 at 20-24.

²²³ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 42. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 263.

²²⁴ *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 42.

²²⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 32. The extent of the deprivation will influence the level of scrutiny applied to the matter.

certain cases, where the effect of the deprivation is particularly severe, the regulatory authority will have to make use of certain strategies to alleviate the negative effect of the regulation to avoid a declaration of invalidity. In the constitutional system the role of limitations (resulting from regulation) is viewed as a mechanism to promote constitutional aims and objectives and to minimise negative effects of the property system. The focus therefore moves away from the inherent/external limitations debate toward a systemic view of how property and regulation fit into the greater (constitutional) legal system.

3 5 The approach to regulation under the Constitution

Many concerns were raised when the constitutionalisation of property was first considered because of the possibility that this would entrench existing property rights and inhibit reform initiatives.²²⁶ The focus has since shifted to developing principles that will ensure that the constitutionalisation of property does not have this inhibiting effect. The courts have embraced and reiterated the view that constitutionalisation should not and does not insulate existing property rights against regulation.²²⁷ Moreover, affording equal protection to property rights is an important step away from the apartheid regime's approach of arbitrarily infringing upon the rights of black rights holders. Property is a right that was denied to a majority of the South African society under the apartheid regime.²²⁸ Seen in this way, the equal protection of property is a reform in itself which serves the objectives of the new constitutional dispensation. However, despite references to the non-absoluteness of property

See *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 49; 53; 98.

²²⁶ See the discussion by Van der Walt *AJ Constitutional property law* (3rd ed 2011) 3-4.

²²⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 52.

²²⁸ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 33.

rights in the constitutional context, there is very little or no in-depth engagement with what is meant by such a statement.²²⁹ In itself it is superfluous to merely assert that property rights can be limited, since this is in no way a departure from the position in doctrinal thinking. Property rights, even ownership, are subject to limitations in doctrinal thinking as well and merely re-asserting that all property rights can be limited does not assist the theoretical alignment that is required.

In Chapter 2 the approach to regulation in private law doctrine was set out to show that property is sometimes conceptualised as a fundamentally absolute, unregulated right. This is at odds with the notion of property as a constitutionally-framed, fundamentally regulated right.²³⁰ Van der Walt states that the “articulation between these two apparently conflicting views of property is of great importance for constitutional property law because it determines the legitimacy and effects of police power regulation of the use and exploitation of property”.²³¹ What is required is a straightening out and alignment of conceptual traditions and customs in the constitutional context because what used to be a private law debate now has to be reassessed in light of the Constitution.²³²

The function of property in the constitutional context has been described as dichotomous. On the one hand, the institution of private property is vehemently defended for its role in

²²⁹ See, for example, *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 62; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 33.

²³⁰ Section 7(3) of the Constitution states that no right entrenched in the Bill of Rights is absolute and section 36 of the Constitution functions as a general limitation clause in terms of which any right in the Bill of Rights may be legitimately limited. The existence of express limitation provisions means that ownership cannot be protected as if it were absolute. This is indicative of acceptance that property rights are inherently limited as opposed to being absolute in principle and merely tolerating limitations.

²³¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 171. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 171.

²³² Van der Walt AJ “Constitutional property law” 2011 (1) *Juta’s Quarterly Review* para 2.3.

promoting individual freedom. In a free market system, private property also serves as an incentive for private initiative. On the other hand, there is a societal interest in private property that strongly rejects the idea of allowing rights-holders to use and exploit their property as they wish without due regard for the effects of such use on society or the environment.²³³ The parameters for protection of property are determined by the values of the property clause as well as the values of other socio-economic rights in the entire normative framework of the Constitution.²³⁴

It seems that one of the problems is identifying the parameters of property rights. Van der Walt explains this problem with reference to the approach of the Appellate Division (as it was then) in the case of *Diepsloot Residents' and Landowners Association & Another v Administrator, Transvaal*,²³⁵ where the Court accepted that the onus was on the state to justify the interference with property rights.²³⁶ Van der Walt points out that perhaps the point of departure should have been to consider whether the “interference” was an infringement to begin with and to critically question whether risks such as increased criminal activity, pollution or an expected drop in property values was inherent to property rights.²³⁷ It is necessary to determine whether these risks are part of the property right or not, since the occurrence or realisation of inherent risks should not be seen as having a diminishing effect on the property that was subject to constitutional protection, or alternatively, taking the view that the risk was never part of the content of the property that was protected.

²³³ Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2005) 579.

²³⁴ Alexander GS “The potential of the right to property in achieving social transformation in South Africa” (2007) 8 *ESR Review* 2-9 9.

²³⁵ 1994 (3) SA 336 (A).

²³⁶ *Diepsloot Residents' and Landowners Association & Another v Administrator, Transvaal* 1994 (3) SA 336 (A).

²³⁷ Van der Walt AJ “Un-doing things with words: The colonization of the public sphere by private property discourse” 1998 *Acta Juridica* 235-281 241.

This approach is comparable to the approach of the US Supreme Court in the *Lucas* decision,²³⁸ in which the Court held that the first question (“is the affected entitlement included in the protected right?”) must be answered with reference to the “background law” that determines the content of property. Only thereafter can the second question (“is the limitation justifiable?”) be answered.²³⁹ However, in *Lucas* this serves a conservative agenda of confirming that the existing law recognises full rights and the law (the applicable legislation) imposes new limitations that require justification and perhaps compensation.²⁴⁰

Despite these indications of reliance on the *Immanenztheorie* and the view that property is inherently limited in the constitutional context, I argue that the more appropriate approach to the regulation of the use of property is a systemic constitutional approach, because the question is not whether limitations are inherent to the right but whether they are inherent to the system in which the right functions. In the constitutional context, there has been an increased focus on the overall property system (as opposed to a primary focus on the protection of existing, individual entitlements).²⁴¹ This approach is in line with the “single-system-of-law” principle that was set out by the Constitutional Court in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa*,²⁴² which makes it clear that all law is subject to the Constitution.²⁴³ The absolutist approach is at odds with the single-system-of-law principle because it conceptualises

²³⁸ *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

²³⁹ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 457.

²⁴⁰ Sax JL “Property rights and the economy of nature: Understanding *Lucas v South Carolina Coastal Council*” (1993) 45 *Stanford Law Review* 1438-1456 1437-1440.

²⁴¹ Van der Walt AJ *Property and constitution* (2012) 128, 172. The liberal perception of property as a natural right that precedes state organisation is no longer a universally accepted view. The realist and relational theorists’ views of property as an economic right and construct of society have been hugely influential in US and German property theory and is increasingly important in South African law.

²⁴² 2000 (2) SA 674 (CC) para 44.

²⁴³ Sections 2 and 39(3) of the Constitution. Also see Van der Walt AJ *Property and constitution* (2012) 130. I discuss the supremacy of the Constitution in more detail in Chapter 4.2.

property as being fundamentally or systemically unrestricted, in the sense that property's abstract completeness precedes the constitutional legal system.

When a property system is viewed from the perspective of an individual property entitlement, every regulation looks like an exceptional imposition that is suspect and must be justified.²⁴⁴ From a systemic perspective the result is quite different, since regulation is an intrinsic, inevitable part of the system.²⁴⁵ Regulation of the use of property is then regarded as a mechanism through which constitutional goals and objectives are promoted and unwanted systemic effects are minimised.²⁴⁶ Moreover, regulation is constitutive of rights to the extent that the scope and content of property entitlements are determined in part by regulation.

In the systemic constitutional approach, rights and limitations form part of a single property system, based on constitutional supremacy. This approach takes a so-called “big picture” view of the property system, and focuses on how property fits into the constitutional legal system. This means that regulation is a sub-component of the property system but it is not restricted to section 25(1) of the Constitution. The regulatory process involves, or is connected to, various other fields of law, which all function together within the normative framework of the Constitution. Rights and limitation both originate from the system; rights are held and exercised in a system that always includes the possibility of legitimate regulation. An important feature of the systemic constitutional approach is that the legal system provides for constitutional controls to govern the imposition and effects of limitations.²⁴⁷

²⁴⁴ Van der Walt *AJ Property and constitution* (2012) 130.

²⁴⁵ Van der Walt *AJ Property and constitution* (2012) 130. This argument is informed by Singer's work of a relational theory perspective, which will be discussed in detail in a subsequent chapter.

²⁴⁶ Van der Walt *AJ Property and constitution* (2012) 141.

²⁴⁷ The features of the systemic constitutional approach are discussed in more detail in Chapter 4.

In the following section, the constitutional protection and regulation of property is considered from the perspective of German law. Several of the issues dealt with thus far have been addressed in German law, which can provide insight to how these problems can possibly be addressed in South African law. The notion of inherent or “immanent” limitations stems from the influential *Immanenztheorie*, discussed in Chapter 2, and several issues pertaining to the regulation of property and limitation of vested rights enjoyed attention in case law and academic writing. I specifically consider the possibility that article 14 of the Basic Law of the German Federal Republic represents an example of the systemic constitutional approach to support the argument in favour of this approach in the South African constitutional context.

3 6 A comparative perspective: German law

3 6 1 Overview²⁴⁸

Article 14(1) and (2) of the German Basic Law of 1949 provides as follow:

²⁴⁸ German law deals extensively with various troublesome issues relating to the limitation of property. There is in-depth engagement with various practical and theoretical problems surrounding the institution of ownership and the social limitations placed on property. I take heed of the warning issued by De Waal J “A comparative analysis of the provisions of the German origins in the interim bill of rights” (1995) 11 *South African Journal on Human Rights* 1-29 2 that the German Basic Law of 1949 (*Grundgesetz*) is more than a “tree from which one can pluck little BMWs which could happily be driven on South African roads”, but academics have shown that German law is a rich comparative source that can provide insight into the complex problems identified thus far. See for example Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 34-39; Mostert H “Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law” (2010) 127 *South African Law Journal* 238-273 255. Thus, the aim of this comparative study is not to copy-and-paste solutions or developments from German law without due regard for the unique context of South African law, but rather to establish whether (and how) these difficulties have been addressed in a jurisdiction that has influenced South African law and gain insight to develop possible solutions.

- (1) Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law.
- (2) Property entails obligations. Its use should also serve the public interest.²⁴⁹

The German property clause is characterised by the tension created by two seemingly opposing views of property, namely the liberal notion of private property as an fundamentally absolute right justified in terms of natural law on the one hand, and the social view of property that focuses on the social function of property, where “property rights are created and restricted by the social context” on the other hand.²⁵⁰ This explicit tension exists because of the positive guarantee in article 14.1.1, contrasted with the qualifications in article 14.1.2 and 14.2.

In Chapter 2, the influence of the German Pandectists is discussed in some detail. Under the Pandectist construction of ownership the characteristics of absoluteness and abstractness

²⁴⁹ Basic law for the Federal Republic of Germany (1995) 18 (official translation) < http://www.gesetze-im-internet.de/englisch_gg/>. (last accessed 03/08/2015). Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 123 suggests that every sentence be numbered individually to ensure brevity and clarity when discussing the importance and implications of each sentence. Therefore, this section will follow Van der Walt’s method of numbering the sentences as “article 14.1.1”, “article 14.1.2” and so forth. Using this structure, Van der Walt indicates that article 14.2, read together with article 14.1.2, constitutes the regulation clause. The German text refers to “*Eigentum*” for which the technical translation is ownership or the objects of ownership, although the official English version uses the term “property”. See Van der Walt AJ *Property and constitution* (2012) 118; Van der Walt AJ “Property rights, land rights, and environmental rights” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism. The new South African legal order* (1994) 455-501 469. The term “*Eigentum*” is also used in private law in the German Civil Code (*Bürgerliches Gesetzbuch*). The body of jurisprudence that address this issue indicates that *Eigentum* is most appropriately translated as “property” in the constitutional context because the narrower meaning of *Eigentum* as ownership of corporeal objects corresponds with the private law understanding and it is necessary to extend the interpretation to a wider range of interests for purposes of adequate constitutional protection. See Van der Walt AJ *Property and constitution* (2012) 119; Kimminich O “Property rights” in Starck C (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 75-91 76. The property clause in article 14 is closely linked to (or seen as a corollary of) the guarantee of free expression in article 2(1) of the Basic Law.

²⁵⁰ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 122.

were heavily emphasised, and this view is still influential in German private law. Because of the particular theoretical development of property rights in Germany, property is regarded as a unitary right and not as a so-called bundle of entitlements.²⁵¹ Consequently, the individual protection of specific entitlements is conceptually more difficult than in other jurisdictions where various entitlements are protected separately.²⁵²

The view that the regulation of the limits of property in terms of the property clause does not actually restrict property or ownership as such still exists. In this view, what is restricted by regulation is its *use* in a specific case, which allows property to remain a fundamentally unregulated right.²⁵³ A further distinction is drawn between having property and using or exploiting property rights and it is argued that the effect of regulation relates to the use and exploitation, and not to the owning or “having” component of property rights.²⁵⁴ Van der Walt explains that this construction explains the occurrence of limitations imposed on private property rights without threatening the traditional doctrinal perception of ownership as a fundamentally abstract and unlimited right in principle.²⁵⁵

The Federal Constitutional Court (*Bundesverfassungsgericht*) saw the necessity to view ownership and property differently in the constitutional context, since the private law notion of ownership conflicts with the nature and function of the German property clause, namely to

²⁵¹ Leisner W “Eigentum” in Isensee J & Kirchhof P (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (1989) 1023-1097 1043-1044 paras 51-53.

²⁵² Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 155. Van der Walt indicates that there are specific recognised limited real rights, such as servitudes, which can be distinguished and that will be regarded and protected as independent property rights.

²⁵³ See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 134.

²⁵⁴ Wendt R “Artikel 14” in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 596 para 41; Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 134. This distinction is not accepted by all academic commentators. See for example Ossenbühl F & Cornils M *Staatshaftungsrecht* (6th ed 2013) 163 where it is stated that the property guarantee protects both having property and the use of property.

²⁵⁵ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 134.

balance the interests of the individual with the interests of society.²⁵⁶ Thus, property in the constitutional context is different from its private-law counterpart.²⁵⁷ Although it is not completely removed from the private law concept and includes all the traditional property interests, it has been extended to create a wider concept of property for purposes of article 14.²⁵⁸ The private law view of property must function within the framework created by the Basic Law.

In German constitutional law, an owner derives his entitlements from the legal system as a whole, rather than from only one single section in the Basic Law that explicitly protects property.²⁵⁹ This is in line with a systemic constitutional view of property and regulation. Protection is deduced from the entire constitutional context and not only the principles of private law or the provisions of the Civil Code.²⁶⁰ Furthermore, the protection of property

²⁵⁶ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 170-171.

²⁵⁷ Ossenbühl F & Cornils M *Staatshaftungsrecht* (6th ed 2013) 160; Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 217. Badura points out that *Eigentum* in the constitutional context includes the private law notion of property, but because the property guarantee is focused on the protection of the sphere of personal liberty, it also includes other interests that were not protected as property in the private law context. Also see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 151.

²⁵⁸ Kimminich O “Property rights” in Starck C (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 75-91 76. See also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 152, where it is explained that this view of the “extension” of the property concept is not uniformly accepted in German law. Leisner, for example, argued strongly against it. Leisner is of the opinion that the concept of property has not been extended for constitutional purposes, but rather that certain public law interests fit in the framework of the narrow view of constitutional property and that is why those interests could also be protected. Also see Baur F “Möglichkeit und Grenzen des Zivilrechts bei der Gewährleistung öffentlicher und sozialer Erfordernisse im Bodenrecht” (1976) 176 *Archiv für die civilistische Praxis* 97-118 97.

²⁵⁹ Kleyn DG “The constitutional protection of property: A comparison between the German and the South African approach” (1996) 11 *South African Public Law* 402-445 424. Also see Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 116-118.

²⁶⁰ This distinction was drawn in BVerfGE 58, 300 1981 (*Naßbauskiesung*). See Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 253.

should be viewed in terms of article 14 as a whole, and not merely in terms of article 14.1.1. The systemic view makes it possible to understand how both the existence of rights and their limitations originate from the legal system (and the values it espouses) as a whole.

The German Federal Constitutional Court acknowledges that article 14 strives to balance private interests and the public interest and characterises it as a tension that exists between “personal freedom and the social function of property”.²⁶¹ Furthermore, the Court has indicated that the Basic Law’s point of departure is not to view man as an egocentric individual who may ignore public needs, but rather as a person who is part of, and dependent on, society.²⁶² In German constitutional law, all aspects of the property guarantee, including its limitation, must be understood in terms of the function or fundamental purpose of the guarantee.²⁶³ The fundamental purpose of the property guarantee is to ensure or secure an area of personal liberty for individuals in the patrimonial sphere, where individuals can take responsibility for the organisation and development of their lives, in a social and legal context, as part of a larger community.²⁶⁴ This is the leading motive for protecting rights as property as a constitutional right. Van der Walt explains that “[t]he limitation of property rights by way of regulation and expropriation must also be understood in their relation to the fundamental purpose of the property guarantee and the distinction between the institutional

²⁶¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 42.

²⁶² Dolzer R *Property and environment: The social obligation inherent in ownership. A study of the German constitutional setting* (1976) 22.

²⁶³ Kimminich O “Property rights” in Starck C (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 75-91 79.

²⁶⁴ BVerfGE 24, 367 1968 (the *Deichordnung* case) para D.I. Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 219 explains that the property guarantee aims to ensure the economic independence and freedom of persons by securing their material interests, although subject to social justice. Also see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 124, 158.

guarantee and the individual guarantee”.²⁶⁵ Ultimately, because of the systemic view, the constitutional protection of property is not regarded as an end in itself, since various constitutional interests are served by the constitutional protection of property.²⁶⁶ Protection is granted as part of the system of fundamental rights that are guaranteed by the Basic Law and it is the objectives of the Basic Law as a whole that must be served by both the protection and the regulation of private property.²⁶⁷ The requirements for and justification of constitutionally valid limitations are applied systemically, in pursuance of constitutional norms and objectives.

3 6 2 *Regulation of property in the German constitutional context*

In German constitutional law the regulation of property derives from legislation that determines the content as well as the limits of property rights.²⁶⁸ The German property clause indicates that the content and limits of property rights are determined and demarcated by the law as it stands at a specific time, because it allows for the substantive amendment of the content of property rights through legislative determination. This is an interesting approach to regulation of the use of property for several reasons. Firstly, it leaves no question that

²⁶⁵ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 131. GS Alexander “Property as a fundamental constitutional right? The German example” (2003) 88 *Cornell Law Review* 733-778 at 755-757 explains that the Federal Constitutional Court’s reasoning in *BVerfGE* 58, 300 (1981) (*Naßauskiesung*) provides a good example of the interaction between the institutional and the individual property guarantee.

²⁶⁶ Alexander GS “Property as a fundamental constitutional right? The German example” (2002-2003) 88 *Cornell Law Review* 733-778 738.

²⁶⁷ Kimminich O “Property rights” in Starck C (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 75-91 79.

²⁶⁸ Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 220. Also see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 132; Van der Walt AJ “Property rights, land rights, and environmental rights” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism. The new South African legal order* (1994) 455-501 470.

property is a fundamentally regulated right. Secondly, the content and limits of property are not fixed, and are determined with reference to existing law, which includes private law and public law. Thirdly, the social function of property is made explicit. The central issue is not whether limitations are inherent or external but rather asking questions about the form that the limitation takes in legislation or other law, because the form of a limitation can change and the change can be seen as deprivation of property that must comply with article 14. Consequently, it is not necessary to categorise the limitation as inherent or external to the right.²⁶⁹

When the legislature sets out to determine the content of property rights (*Inhalt*), the focus is on either the preservation of existing property institutions or, alternatively, on the development or establishment of new property institutions.²⁷⁰ The determination of the limits of property (*Schranken*), on the other hand, is concerned with individual property rights. The limits of property must be determined with due regard to the constitutional mandate placed on the legislature to protect and respect existing individual property rights.²⁷¹ However, article 14.1.2 and 14.2 subject individual property rights to social limitations (*Sozialbindung*).²⁷² Badura indicates that the social obligation or duty of property (*Sozialgebundenheit des*

²⁶⁹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 42; Dolzer R *Property and environment: The social obligation inherent in ownership. A study of the German constitutional setting* (1976) 29.

²⁷⁰ Wendt R “Artikel 14” in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 601 para 55; Kimminich O “Property rights” in Starck C (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 75-91 83; Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 132-133.

²⁷¹ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 133.

²⁷² Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 133. This principle of *Sozialbindung* must not be confused or conflated with the principle of *Situationsgebundenheit*, which states that the nature, content and limits of property interests are determined by their physical context and “situation”, and not their social function in general, as is the case with the principle of *Sozialbindung*. See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 155; Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 431.

Eigentums) is a term used for a variety of changes or amendments to the content or limits of property.²⁷³ The social obligation binds both the legislator in determining the content and limits of property and the rights holder in exercising her rights.

The German Basic Law 1949 does not include a general limitation provision comparable to section 36 of the South African Constitution.²⁷⁴ Nevertheless, the German approach to limitation has been characterised as *limitational* as opposed to *definitional*, which corresponds to the approach in South African law.²⁷⁵ A limitational approach focuses on the individual and contextual justification of a specific limitation of property, whereas with the definitional approach the focus is on whether or not a specific right is property and falls within the protection of the guarantee.²⁷⁶

The individual guarantee (*Bestandsgarantie* or *Individualgarantie*) guarantees the eligibility to be the holder of property and is aimed at protecting individual property owners against specific instances of state interference with their property.²⁷⁷ The protection that is offered to concrete, individual rights does not mean that these rights may not be interfered

²⁷³ Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 219. The legislature gives content to the social obligation through the limitations it imposes on property.

²⁷⁴ Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) 113 *South African Law Journal* 267-296 271; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 92.

²⁷⁵ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 158.

²⁷⁶ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 158.

²⁷⁷ Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 217, 220; Schmidt R *Grundrechte* (5th ed 2004) 393.

with at all, but it sets out the requirements that the legislature must adhere to when determining the limits (*Schranken*) of property in terms of article 14.1.2.²⁷⁸

Article 14 does not only protect concrete individual entitlements, but also protects the institution of private property.²⁷⁹ This is the institutional guarantee (*Institutionsgarantie* or *Einrichtungsgarantie*) and it concerns the entire system or framework of private property.²⁸⁰ A network of legal rules, norms and principles that sets out the essence of property is upheld by the institutional guarantee, which ensures that the essence of the institution of private property is not abolished by legislation and prescribes the fundamental values of the existing social and legal order.²⁸¹ However, neither the individual guarantee nor the institutional guarantee insulates the system of private property against regulatory interference,²⁸² although

²⁷⁸ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 128, 131-132; Kleyn DG “The constitutional protection of property: A comparison between the German and the South African approach” (1996) 11 *South African Public Law* 402-445 413.

²⁷⁹ Leisner W “Eigentum” in Isensee J & Kirchhof P (eds) *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (1989) 1023-1097 1029 para 12.

²⁸⁰ Wendt R “Artikel 14” in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 587 para 10; Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 129. Also see Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 217; Schmidt R *Grundrechte* (5th ed 2004) 393.

²⁸¹ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 129; Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 407.

²⁸² Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 220; Weber RH “Eigentum als Rechtsinstitut. Beurteilungsstand und Entwicklungstendenzen” (1978) *Zeitschrift für Schweizerisches Recht* 161-191 177. See for example the discussion by Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 130-131 where the institutional guarantee is analysed. It is accepted by the *Bundesverfassungsgericht* that certain categories of property may be removed from the sphere of private ownership, but the removal must be constitutionally justified. In *BVerfGE* 24, 367 1968 (the *Deichordnung* case) the removal of dike land from the sphere of private rights through legislation was held to be constitutionally sound. The importance of effective flood control justified the removal of this type of property from the personal sphere, and it is not contrary to the institutional guarantee.

the guarantees aim to prohibit the state from unduly reducing the sphere of personal liberty, in line with the fundamental purpose of the property clause.²⁸³

The constitutional protection of property is closely associated with personhood and individual liberty. Personal property that is connected to these values will not be subject to the same range of legitimate limitations, while property rights more closely associated with the social interest might be limited more extensively.²⁸⁴ This is the so-called “grading” or “scaling” of social limitations of property according to the relation of the property to the holder of the rights and secondly, its social function.²⁸⁵ This approach is often explained with reference to the example of regulation of the family home, contrasted with the regulation of the use and exploitation of limited natural resources such as land, which may be subject to much stricter regulatory measures.²⁸⁶ The type or extent of a lawful regulation is connected to the function of the property.²⁸⁷ The grading or scaling of social limitations makes sense in German constitutional law because the approach is that property is protected to secure a sphere of personal freedom for the individual, and therefore property that is closely associated with personal freedom will be subject to less extensive regulatory measures. Accordingly, if the function of property is regarded as important to the social interest, the

²⁸³ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 130.

²⁸⁴ Ossenbühl F & Cornils M *Staatshaftungsrecht* (6th ed 2013) 161. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 103. This approach is sometimes referred to as the *Abstufung der Sozialpflichtigkeit*.

²⁸⁵ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 135. Also see Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 426.

²⁸⁶ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 103; Alexander GS “Property as a fundamental constitutional right? The German example” (2002-2003) 88 *Cornell Law Review* 733-778 740.

²⁸⁷ Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 297.

legislature is at greater liberty to determine the content and limits of rights in that property.²⁸⁸

The social obligation also depends on situation-based factors and is therefore closely related to the *Situationsgebundenheit* principle.²⁸⁹ An owner is presumed to know, based on the location and nature of the property, that the property cannot be used in certain ways, even if the particular use is not expressly prohibited.²⁹⁰

The *Situationsgebundenheit* principle is especially important in the context of the regulation of the use of property, because it is often central to zoning and planning law disputes, as well as the protection of historical sites and other conservation issues.²⁹¹ The Federal Administrative Court formulated the *Situationsgebundenheit* principle as follows:

“A certain use of a property is only protected by the constitutional guarantee if the user can reasonably rely on the permanent continuation of that use, and that cannot be the case if she reasonably should have foreseen, when using the property in that way at first, that the nature of the area, or the natural or probable development of the area does or will make that use unreasonable in that it does or will constitute a nuisance.”²⁹²

Van der Walt states that the physical situation and context of land will determine the nature, content, and limits of property rights in the specific land in four ways. Firstly, beneficial

²⁸⁸ Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 297.

²⁸⁹ Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 431.

²⁹⁰ Wendt R “Artikel 14” in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 597 para 45; Van der Walt AJ “Property rights, land rights, and environmental rights” in Van Wyk D, Dugard J, De Villiers B & Davis D (eds) *Rights and constitutionalism. The new South African legal order* (1994) 455-501 472; Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 431.

²⁹¹ See Kimminich O “Property rights” in Starck C (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 75-91 88.

²⁹² BVerwGE 38, 209 1971 at 219.

characteristics of the situation of the land can, generally speaking, not be relied on as of right. Secondly, beneficial characteristics do not form an inherent part of the property if the reasonable user would not have exercised them or relied on their permanence or continuation. Thirdly, and this follows from the previous points, beneficial characteristics only provide the land user with a right if reliance on the characteristic in question was reasonable and justifiable. Fourthly, unfavourable characteristics only constitute limitations on the use right if the reasonable user would have regarded them as such.²⁹³ These principles explain why an owner or occupier would very rarely (only in exceptional circumstances) be allowed to claim that a previously favourable situation should continue.²⁹⁴ Thus, the situation or location of the property will affect the extent to which the state can lawfully or legitimately regulate the property.²⁹⁵

Some of the issues regarding limitation of vested or exercised rights have been addressed in German constitutional law, and it is accepted that article 14 does not guarantee that existing rights will be upheld unchanged for ever.²⁹⁶ In the German context, this issue has repeatedly come up with regard to transitional provisions where new legislation affects existing rights with the effect that those rights are severely restricted or even removed

²⁹³ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 155. Also see Dolzer R *Property and environment: The social obligation inherent in ownership. A study of the German constitutional setting* (1976) 37; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 237.

²⁹⁴ Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 237.

²⁹⁵ Kleyn DG “The constitutional protection of property: A comparison between the German and the South African approach” (1996) 11 *South African Public Law* 402-445 426-427.

²⁹⁶ Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 220; Weber RH “Eigentum als Rechtsinstitut. Beurteilungsstand und Entwicklungstendenzen” (1978) *Zeitschrift für Schweizerisches Recht* 161-191 177; Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 163.

entirely from the private sphere.²⁹⁷ The accepted position is that the legislature is allowed to impose a new regime on existing rights that will either restrict or abolish those rights, without violating the property guarantee.²⁹⁸ The legislature is not constitutionally obliged to either leave existing rights intact, or to expropriate those rights (against payment of compensation).²⁹⁹ However, the legislature is bound to certain requirements in order for a regime change to be valid, namely that the *Rechtsstaatprinzip* (rule-of-law principle) must be respected, and the regulatory measures must be justified by considerations of public interest and their effects must be in accordance with the proportionality principle.³⁰⁰

Article 14 does not protect the mere expectation of future earnings or profit that an owner expects to acquire based on nothing more than an existing favourable situation, such as a lack of pre-existing regulation or a general zoning designation of one's parcel of land before a building permit has been applied for.³⁰¹ Reliance on an existing legal situation will not always offer grounds for protection.³⁰² However, that which has been acquired through labour

²⁹⁷ BverfGE 42, 263 (1976) (*Contergan*).

²⁹⁸ This functions on two levels: firstly, in terms of the institutional guarantee, where the content of rights are affected by regime changes. The second level is that of the individual guarantee, where the limits or extent of individual rights are affected by legislation. Proportionality will be relevant in both scenarios, but not necessarily in exactly the same way. Kleyn DG “The constitutional protection of property: A comparison between the German and the South African approach” (1996) 11 *South African Public Law* 402-445 413-416.

²⁹⁹ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 163.

³⁰⁰ Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 163. Also see Badura P *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (3rd ed 2003) 311.

³⁰¹ Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 439. See also Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 227 where it is explained that only specific rights are protected under the property clause; general wealth or patrimony or the value of an estate are not protected.

³⁰² Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 439.

or investment is generally constitutionally protected, and there is less scope for interference.³⁰³

The limits of property are dynamic and capable of adapting to changed social or economic circumstances.³⁰⁴ Changed circumstances can serve as justification for imposing stricter regulations on property, or for removing restrictions that have become overly strict, effectively changing the “extent” of previously-held individual rights.³⁰⁵ Dolzer asserts that the vested rights of the owner must prevail if a building was legal at the time of construction, but at a later stage became unlawful due to changed circumstances.³⁰⁶ However, this is probably not a nuanced enough position, because it is accepted that an existing situation cannot be expected to last forever or to remain unchanged.

The difficult question of amending or prohibiting previously lawful uses in the building or planning context is dealt with in legislation in German law. For example, section 42 of the *Baugesetzbuch* (“*BauGB*”) provides guidelines to establish when compensation is payable to an owner for the amendment or prohibition of a previously lawful use of his property (*Entschädigung bei Änderung oder Aufhebung einer zulässigen Nutzung*).³⁰⁷

³⁰³ Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 439.

³⁰⁴ Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 427.

³⁰⁵ Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 439. See for example *BVerfGE* 52 I 1979 (*Kleingarten*); *BVerfGE* 37 132 1974 (*Wohnraumkündigungsschutzgesetz*).

³⁰⁶ Dolzer R *Property and environment: The social obligation inherent in ownership. A study of the German constitutional setting* (1976) 22.

³⁰⁷ *Baugesetzbuch in der Fassung der Bekanntmachung vom 23. September 2004 (BGBl. I S. 2414), das zuletzt durch Artikel 1 des Gesetzes vom 11. Juni 2013 (BGBl. I S. 1548) geändert worden ist*. See <<http://www.gesetze-im-internet.de/bbaug/index.html#BJNR003410960BJNE009804301>> (Last accessed 08-05-2014).

The issue regarding the regulatory limitation of vested rights and the situational commitment of property is addressed in German law in the context of the *Anliegerrecht und Anliegergebrauch* (the right to use roads adjacent to land) which is protected as inherent to the property right.³⁰⁸ The resultant limitations on the property also form an inherent part of it, since both the right and the limitation “derive from the nature and situation of the property itself”.³⁰⁹ The rights-holder has the right to use adjoining pavement and roads, but must bear the burden brought about by public regulation and public use of these areas, as well as the accompanying noise, traffic, pollution or road works.³¹⁰ Temporary limitations on the right to use adjacent roads or public spaces, such as building renovations or road repairs, must usually be endured by the owner or occupier.³¹¹ However, this general rule is qualified by a proviso, namely that if the nature or use of the road is changed for the benefit of the public in general and the new burden is disproportionate, it would be unreasonable to expect the rights holder to bear the “new” burden.³¹²

³⁰⁸ Schmidt R *Grundrechte* (5th ed 2004) 397. Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 236 indicates that it is regarded as part of the property because of the nature and location of the property.

³⁰⁹ See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 154.

³¹⁰ Schmidt R *Grundrechte* (5th ed 2004) 397.

³¹¹ Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 236-237.

³¹² Schmidt R *Grundrechte* (5th ed 2004) 397; Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 154. Also see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 375 in this regard, since it is interesting to compare this approach to that of Swiss law, where the *de facto* beneficial use of (or access to) public property (a so-called favourable *de facto* situation) is not covered by the property clause and is not recognised or protected at all.

3 6 3 *An example from German constitutional case law: BVerfGE 58, 300 (Naßauskiesung)*

The systemic approach to the regulation of property can better be explained with reference to practical problems and their resolution in German case law. In the *Naßauskiesung*³¹³ decision the Federal Constitutional Court held that the constitutional notion of property is different from its private law counterpart and that the protection is also different. In this case the plaintiff was denied a permit to use groundwater occurring on his land and he argued that the denial of his right to use the water in a specific way amounted to an expropriation without compensation.³¹⁴ The German Civil Code provides a landowner with the entitlement to exercise and exploit any and every conceivable and economically sensible use of the land, but the Federal Constitutional Court held that a literal interpretation of this provision would not be in line with article 14.1 and 14.2 of the Basic Law.³¹⁵

Judged systemically, ownership is limited because of the way article 14 is formulated. However, specific limitations may vary and if they increase, that is seen as a limitation, but that does not detract from the fact that ownership (of for example the right to use water) is an inherently limited right in the constitutional context. The nature and purpose of the limitation determines its validity in terms of proportionality, but before that it is necessary to determine whether there was a limitation that needs to be justified.

One of the objectives of the Basic Law is a property system that balances the rights and interests of the individual and society. The approach in private law, in accordance with the Civil Code, can thus not be followed without considering whether the appropriate balance is struck for the constitutional context. Moreover, the Court indicated that the entitlements of a

³¹³ BVerfGE 58, 300 1981.

³¹⁴ BVerfGE 58, 300 1981 337-338.

³¹⁵ BVerfGE 58, 300 1981 335.

property holder must be determined with reference to all relevant statutory principles in force at that time, and in determining the content and limits of property private-law principles should not carry more weight than public-law principles.³¹⁶ Importantly, the Court stated that the constitutional notion of property ought to be derived from the Basic Law itself. It held that constitutional property is not based on or derived from “legal norms” that are lower in rank than the Basic Law, nor is the protection offered by the Basic Law determined only by private-law regulations.³¹⁷

The Court acknowledged that the regulation had an impact on the individual guarantee (*Bestandsgarantie*) because a permit was now required to use groundwater, while no permit was previously required to exercise this entitlement. However, the limitation and its effects could be justified. Moreover, the Court considered the vital importance of protecting limited public resources and held that this was a “property-content regulation” and not an expropriation.³¹⁸ The owner does not have the unfettered right to the groundwater under his property, and therefore there was no right taken from him. The owner’s right to the groundwater was always held subject to the possibility of legitimate limitation.³¹⁹

This final point is a crucial part of what makes this aspect of German law suitable for comparison with (and potential development of) South African law. It indicates that although German doctrine probably subscribes to the idea of inherently limited rights, the important question in the constitutional context is whether the manifestations of the limitation and its

³¹⁶ BVerfGE 58, 300 1981 335-336. Also see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 145.

³¹⁷ BVerfGE 58, 300 1981 335. Also see Kommers DP & Miller RA *The constitutional jurisprudence of the Federal Republic of Germany* (3rd ed 2012) 642.

³¹⁸ BVerfGE 58, 300 1981 336.

³¹⁹ BVerfGE 58, 300 1981 336-337. Also see Ossenbühl F & Cornils M *Staatshaftungsrecht* (6th ed 2013) 153; Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 409.

effects can be justified. The justification of a limitation is considered, apart from its authority, with reference to the proportionality principle. The proportionality principle forms an important part of constitutional property law because it concerns the justifiability of restrictions or limitations that are imposed on property. The Basic Law does not explicitly refer to the proportionality principle (*Verhältnismäßigkeit*), but it is regarded as an essential component of the formal concept of the *Rechtsstaat* as well as a fundamental part of constitutional interpretation.³²⁰ The proportionality principle requires a legitimate purpose for limiting a fundamental right (in this case the right to property); that the purpose be served by the appropriate and necessary means; and that the means be proportionate (not excessive) in relation to the ends which the limitation aims to achieve.³²¹ A limitation is excessive if it is more far-reaching or extensive than necessary or if less invasive means would serve the same purpose.³²²

3 6 4 *Concluding remarks: Property and regulation in German constitutional law*

The wording of article 14 of the Basic Law, especially the explicit reference to determination of the content and limits of rights in article 14.1.2, indicates that property is not a pre-constitutional, fundamentally unregulated right. Property is constitutionally entrenched to secure a sphere of personal liberty for individuals to organise their lives, and it is interpreted, regulated and protected in a manner that is in line with and that supports broader constitutional commitments. Courts therefore consider the systemic constitutional effects of

³²⁰ See Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) 113 *South African Law Journal* 267-296 268.

³²¹ See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 161; Lubens R “The social obligation of property ownership: A comparison of German and US law” (2007) 24 *Arizona Journal of International and Comparative Law* 389-449 423.

³²² See Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 290.

property, and regulation is recognised as a way of minimising negative systemic effects and promoting constitutional goals.

The wording of article 14 and the focus of the *Bundesverfassungsgericht* on the role and purpose of property in the constitutional legal system paves the way for a systemic constitutional approach to the regulation of the property, although systemic terminology is not expressly used in German case law or literature. In South African law more work needs to be done to create the foundation for a systemic constitutional approach, because the formulation of section 25 does not clearly prescribe a systemic view of property, and regulatory disputes have thus far largely been approached in a modular fashion. In South Africa's constitutional property context, the focus has mostly been on the parameters of protection for property rights and the role of regulation in the context of section 25. The role and function of regulation of the use of property as part of the larger constitutional legal system has not fully been worked out yet. In contrast to German constitutional law, South African law is still in the process of determining what the desirable features of a constitutional property system are and how the property system fits into the normative framework of the Constitution.

However, in *Shoprite* the South African Constitutional Court referred specifically to the *Naßauskiesung* decision as an example of how a constitutional notion of property should be derived from the provisions of the Constitution itself. It cannot be derived from legal norms lower in rank than the Constitution. According to the Court, a similar approach ought to be adopted in South African law, especially in light of the supremacy clause in section 2 of the Constitution.³²³

³²³ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 46 footnote 76.

3 7 Conclusion

The Constitution challenges the existing property system, and presents an opportunity to critically reconsider the legal landscape in South Africa. One of the core difficulties with the constitutional protection of property (including the constitutional adjudication of constitutional property disputes) is “the collision of the *idea of property* with the *idea of change*.”³²⁴ This chapter aims to show that this statement aptly describes the situation in South Africa where the doctrinal view of ownership and property must be reconciled with the general *idea of change* that was introduced by the Constitution. The point of departure in the constitutional setting is that “[a]ll property is subject to the law and regulation by the law.”³²⁵

This chapter focuses specifically on the question of how property is protected and limited in terms of section 25(1) of the Constitution. I argue that from a constitutional perspective, the restrictions placed on property rights should not be viewed as undermining the protection of private property rights or entitlements. The constitutional protection of property is not primarily aimed at the protection of pre-existing individual property rights. The aim of the property clause in the Bill of Rights is to find an appropriate balance between the interests of the individual and the interests of society. Therefore, section 25(1) allows deprivations of property under certain circumstances to ensure that state regulation of the use, exploitation and enjoyment of property is possible and legitimate to further constitutional objectives, whilst also affording adequate protection to property holders against arbitrary infringements.³²⁶ This means that disputes regarding the protection of property entitlements cannot be determined or adjudicated without reference to the constitutional objectives of the

³²⁴ Underkuffler LS “Property and change: The constitutional conundrum” (2013) 91 *Texas Law Review* 2015-2037 2016.

³²⁵ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 60.

³²⁶ Van der Walt AJ *Property and constitution* (2012) 142.

system as a whole. Ultimately, within the systemic view of regulation, space is created to reconcile the idea of property with the idea of change to ensure that both the protective and the transformative objectives of section 25(1) are reached.

The *PE Municipality* decision is a celebrated milestone insofar as it created awareness of the broad constitutional matrix that should inform how property rights (and therefore also the regulation of property and disputes pertaining thereto) should be dealt with. This decision emphasises the importance of protecting property rights to avoid a situation where there is no certainty or security in property rights, while simultaneously highlighting the need for an opening-up or restoration of property rights by subjecting existing entitlements to new or more extensive regulation.³²⁷

While the inherently-limited nature of property rights makes it doctrinally easier to accept the constitutional justification of regulatory limitations of property, it is still hampered by its private law, doctrinal origins, and fails to envision the facilitative role that regulation of the use of property can play in achieving constitutional objectives.³²⁸ The analysis in this chapter emphasises that in the constitutional context, the question of inherent or external limitations are less important (and in fact becomes irrelevant) because one can recognise the existence of an inherent limitation, but still ask questions about the time-and-place specific shape that the limitation takes in legislation or other law that creates it. The limitation can change and the change can be seen as deprivation of property that must comply with section 25(1), regardless of whether or not the limitation is classified as inherent to the right or not. It is

³²⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 15. Van der Walt AJ *The law of neighbours* (2010) 9 describes this as “a useful approach, a kind of analytic rhythm, for reform- or transformation-oriented analysis and evaluation of existing law”.

³²⁸ See Chapter 2.3.5 and 2.3.7 for a discussion on the limits of the inherent limitation approach in private law doctrine. A conceptualisation of property as an inherently limited right remains focused on individual rights, which is fundamentally inconsistent with a systemic constitutional approach. I expand on this point in Chapter 5.3 and 5.4.

therefore more useful to focus on the requirements for a constitutionally valid limitation, and to consider whether the effects of the limitation can be constitutionally justified, while assuming that the existence of the limitation as such is systemically justified by the constitutional legal system.

In a similar vein, the question of when a limitation constitutes a deprivation of property becomes less important. The case law thus far indicates that the debate in constitutional property law will be less focused on the content of property, and subsequently also less concerned with the nature (inherent or exceptional) of limitations, and more focused on the requirements for and justification of the effects of limitations.³²⁹ The analysis in this chapter shows that the property system under the Constitution is fundamentally a regulated system which does not view property as a natural, pre-social right that merely tolerates restrictions. Property is therefore both recognised and circumscribed within this inherently regulated system.³³⁰ Despite the fact that a systemic view might appear less obviously appropriate than is the case in German constitutional law, it nevertheless seems to offer advantages that South African legal development might benefit from for two reasons. Firstly, German constitutional law shows that when property is protected and regulated in a manner that is in line with the value system of the broader constitutional context, it is easier to find an appropriate balance between the individual and the public interest in a structured, principled manner. This allows for more consistency when dealing with regulatory disputes. Secondly, a systemic view supports the development of a single system of law, where all law fits into the constitutional system, with no unjustified parallel development. The features and advantages of the

³²⁹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 84. This approach was confirmed in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015).

³³⁰ Van der Walt AJ *Property and constitution* (2012) 29.

systemic constitutional approach in the context of overlap areas of law are explored in more detail in the next chapter.

Chapter 4

The regulation of property and the right to just administrative action

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4 1 Introduction

“[I]ndividual welfare is shaped less and less by common law rules, more and more by legislative and administrative action.”¹

The regulation of the use of property is an integral part of modern society to ensure that private property is used in a manner that is reconcilable with the public interest and the aims and objectives of the Constitution. The use, enjoyment and exploitation of property are shaped not only by other areas of law, but also by various social, economic and political factors. There has been a great expansion of public power into what has previously been regarded as areas of private life, and public or state action (in the form of administrative, executive or legislative action) significantly affects property and individual welfare.² It is therefore necessary to develop a clear picture of the role and function that property ought to fulfil in society and to ensure that regulatory measures imposed on property support the ideal, instead of undermining it, irrespective of which field of the law is applicable to control or scrutinise the regulation. The quote above shows the importance of coming to terms with how especially administrative and legislative measures impact substantially on “individual welfare” and it is necessary to critically analyse the areas of the property system where legislative, executive and administrative action overlap with property law rules and principles.

¹ Stewart RB & Sunstein CR “Public programs and private rights” (1982) 95 *Harvard Law Review* 1193-1322 1204. See Walsh R “The evolving relationship between property and participation in English planning law” in Hopkins N (ed) *Modern studies in property law: Volume 7* (2013) 263.

² Hoexter C *Administrative law in South Africa* (2nd ed 2012) 10-11 comments on the expansion of public power from the 20th century onward.

In Chapter 4, I take a step back from section 25 of the Constitution to consider how property and regulation fit into the bigger constitutional legal system, and consider the role and relevance of the right to just administrative action in the context of the regulation of the use of property. The regulatory limitation of property rights is often brought about by administrative action and the constitutional protection of property is thus closely connected to the constitutional right to just administrative action in section 33 of the Constitution, together with the Promotion to Administrative Justice Act 3 of 2000 (PAJA).³ Section 33 of the Constitution reads as follows:

“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.”

³ PAJA was specifically enacted to give effect to section 33 of the Constitution, as mandated by section 33(3) and should thus regulate disputes relating to the right to just administrative action. See Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-5; 63-7. The provisions of PAJA should apply to a dispute of a general administrative nature, but where specialised legislation exists, that legislation is applicable to the dispute. See for example *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC) paras 80, 89 where the Constitutional Court held that the matter was reviewable under the Labour Relations Act 66 of 1995 (LRA) and not under PAJA, because the LRA was specialised legislation that dealt with administrative law specifically in the labour law context. Also see Hoexter C “Clearing the intersection? Administrative law and labour law in the Constitutional Court” (2008) 1 *Constitutional Court Review* 209-234 212; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 268; Van der Walt AJ *Property and constitution* (2012) 40.

The problem that this chapter highlights is that a large part of regulation of the use of property is brought about by administrative action, but there are also instances where there is no administrative action involved. Effectively, this means that there are at least two potential regulatory systems that can regulate the regulation itself, depending on the source and authority for the regulation, and furthermore, that a decision has to be made as to which set of controls applies to a specific case. In the systemic constitutional approach, each of these systems must have a demarcated field of application, because of the prohibition against the creation of parallel legal systems.

In Chapter 4, I set out the area of overlap between sections 25(1) and 33 of the Constitution and consider why it is important to have an appropriate way of addressing the area of overlap in light of the “single-system-of-law” principle.⁴ This includes an analysis of the role and function of subsidiarity principles as well as a brief description of the principles of constitutional property law and administrative law that have an impact on the regulation of the use of property. I also explore various developments in so-called “overlap” and “non-overlap” cases that can impact on the regulation of the use of property to determine the implications of these developments in light of the single-system-of-law principle.⁵ The two areas in which the developments fall primarily deal with procedural fairness *vis-à-vis* procedural non-arbitrariness and reasonableness *vis-à-vis* substantive non-arbitrariness. These

⁴ The principle was formulated in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44 and is discussed in more detail in the following section.

⁵ I borrow the terms “overlap” and “non-overlap cases” from Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 641 but I use it in the context of property law and administrative law. “Overlap” cases refer to cases where both property law and administrative law are applicable, while “non-overlap” cases refer specifically to cases where either the principles of property law or administrative law are used to reach a decision, but not both. It does not fall within the scope of this study to critically engage with similar problems that arise in the socio-economic rights context, although socio-economic rights jurisprudence is cited occasionally in support of a particular argument.

two areas provide substantial scope for considering in more detail what a constructive alliance between sections 25 and 33 of the Constitution would look like.⁶ They also give some indication as to why it is important to consider what the relationship between the regulatory systems is once a decision about applicability has been made.

Therefore, the aim of this chapter is firstly to show that there are two regulatory systems potentially applicable to certain categories of regulatory disputes and to determine how the choice between the systems is made. Secondly, the goal is to consider the relationship between the two regulatory systems, once the choice has been made. The relationship between the two regulatory systems is important, because the analysis in this chapter shows that even after the choice has been made, the systems continue to influence each other. I argue that if control of the regulation falls within the ambit of section 25, the principles of administrative law still influence the constitutional review process, primarily because of the way procedural non-arbitrariness is interpreted.⁷ Conversely, if control of the regulation falls within the province of administrative law, the principles of constitutional property will influence the normative context of reasonableness review in terms of PAJA.⁸ Parallel development in the constitutional legal system is often the result of failing to recognise either the existence of an area of overlap between the regulatory systems or overlooking the relevance of a similar development in the system that was not selected. Parallel developments are discussed in more detail below.

⁶ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 28.

⁷ This argument is made in section 4.6.3 below.

⁸ See sections 4.4 and 4.6.6 below.

4 2 The system of the Constitution⁹

4 2 1 The supremacy of the Constitution

The Constitution is the supreme law of the Republic of South Africa.¹⁰ With the advent of a new democratic regime, parliamentary sovereignty was abandoned and the Bill of Rights now binds the legislature, the executive, the judiciary and all organs of state.¹¹ Although the Constitution is the supreme law, existing laws of the Republic of South Africa remain in force.¹² However, section 172(1)(a) of the Constitution mandates the courts to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency. Therefore, no part of the law is exempt from constitutional scrutiny, despite the point of departure that pre-constitutional law is valid and remains in force.¹³ The single-system-of-law principle was expressed by Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*.¹⁴ The court held that:

⁹ The title of this section is taken from Vermeule A *The system of the constitution* (2011).

¹⁰ See sections 1(c) and 2 of the Constitution. Hereafter referred to as “the Constitution”. Also see Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-2. Michelman FI “The rule of law, legality and the supremacy of the Constitution” in Woolman S & Bishop M *Constitutional law of South Africa (CLOSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 at 11-35 – 11-36 argues that the Constitution is the supreme law in what he calls the “trumping sense”, meaning that insofar as another source of law conflicts with the Constitution, that law will be unconstitutional and therefore invalid. However, Michelman suggests that constitutional supremacy is also a value (or “desired condition”). Constitutional supremacy in the “trumping sense” is therefore a rule that aims to achieve the desired condition.

¹¹ Section 8(1) of the Constitution.

¹² Sections 2 and 39(3) of the Constitution.

¹³ See Van der Walt AJ *Property and constitution* (2012) 20, where it is explained in more detail that legislation and the common law do not exist separately or independently from the Constitution.

¹⁴ 2000 (2) SA 674 (CC) para 44.

“There is only one system of law. It is shaped by the Constitution which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”¹⁵

At the core of the principle of a single system of law lies the prohibition against creating (or allowing) parallel systems of law, either in an attempt to shield certain areas from the influence of the Constitution, or alternatively when different sources of law are potentially applicable and different litigation “routes” are created for litigants to obtain some advantage, or because it is unclear to a court what the appropriate source of law is.¹⁶ Parallel systems are created through the relationship between sources of law (the Constitution *vis-à-vis* legislation, the Constitution or legislation *vis-à-vis* the common law) or through the relationship between different areas of law (such as property law and administrative law).

Michelman identifies a link between the value of constitutional supremacy and what he refers to as the “unity of the legal system”.¹⁷ The single-system-of-law principle (together with the notion of constitutional supremacy) effectively blurs the dividing line between private law and public law; a conceptual divide traditionally adhered to in South African law.¹⁸ This divide stems from 19th century liberal thinking and the subsequent interpretation

¹⁵ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44.

¹⁶ These scenarios are discussed in more depth in section 4.2.2 to explain the reason for and the application of “subsidiarity principles”.

¹⁷ Michelman FI “The rule of law, legality and the supremacy of the Constitution” in Woolman S & Bishop M *Constitutional law of South Africa (CLOSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 at 11-36. Generally, see Luhmann N “The unity of the legal system” in Teubner G (ed) *Autopoietic law: A new approach to law and society* (1988) 12-35.

¹⁸ Gobetti D “Humankind as a system: Private and public agency at the origins of modern liberalism” in Weintraub J & Kumar K (eds) *Public and private in thought and practice: Perspectives on a grand dichotomy* (1997) 103-132. Also see Michelman FI “The rule of law, legality and the supremacy of the Constitution” in Woolman S & Bishop M *Constitutional law of South Africa (CLOSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 at 11-5; Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 59.

of Roman-Dutch law. A central premise of the liberal viewpoint is that the private sphere is pre-political and that state interference should be kept to a minimum.¹⁹

This is no longer a tenable position in South Africa, since section 8 of the Constitution makes provision for the horizontal application of fundamental rights and poses a clear challenge to the status quo.²⁰ Other sections, such as section 39 of the Constitution, also have implications for the private/public dichotomy, although the courts have been hesitant to undertake large-scale reform of common-law institutions on this basis.²¹

Continued adherence to a strict divide between private law and public law could insulate existing social and economic relationships against change and protect private law rules or institutions from constitutional scrutiny.²² Existing rights or common law institutions cannot be protected if it would be in conflict with the aims and objectives of the Constitution and

Although the divide still exists in South African law, the boundaries are becoming less and less clear in certain areas of law. However, see for example Van Wyk J *Planning law* (2nd ed 2012) 65-74 for a discussion of the private/public law divide in the context of planning law and its usefulness as a tool to identify the correct source of law.

¹⁹ Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 61, 317-335; Van der Walt AJ “Tradition on trial: A critical analysis of the civil-law tradition in South African property law” (1995) *South African Journal on Human Rights* 169-206 180-181.

²⁰ The horizontal application of the Bill of Rights is controversial and the role and scope of section 8 have been debated by courts and academics alike. The debate falls outside the scope of this study, but see the discussion by Van der Walt JWG “Perspectives on horizontal application: *Du Plessis v De Klerk* revisited” (1997) 12 *South African Public Law* 1-31; Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 335-376 for a general overview.

²¹ Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 62, 335-376 is mostly critical of this hesitant approach taken by the courts, but Fagan A “The secondary role of the spirit, purport and objects of the Bill of Rights in the common law’s development” (2010) 127 *South African Law Journal* 611-627 argues that the influence of the Constitution on common law is limited. For a general discussion of this line of thought in the property law context, see Van der Walt AJ “Tradition on trial: A critical analysis of the civil-law tradition in South African property law” (1995) *South African Journal on Human Rights* 169-206 185. For a critical response to Fagan, see Van der Walt AJ *Property and constitution* (2012) 92-97.

²² Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 60.

specifically the Bill of Rights.²³ There is only one system of law, and the Constitution provides the foundation and framework of that system.

In Chapter 3 it became clear that regulatory restrictions placed on property rights should not be viewed as undermining the protection of private property rights because the constitutional protection of property is not only aimed at the protection of individual property rights. As was indicated in Chapter 3, the German understanding of the role and function of the constitutional protection of property might prove useful in the South African context.²⁴ In German constitutional law, the constitutional protection of property is not regarded as an end in itself because a variety of interests are served by protecting property as a fundamental right.²⁵ Protection is granted as part of the system of fundamental rights that are guaranteed by the Basic Law and it is the objectives of the Basic Law as a whole that must be served by the protection and regulation of private property.²⁶

Although such a systemic approach to the regulation of property is not as well-established in South African law as in German law, there is support for it in the literature and *dicta* of especially the Constitutional Court are in line with this view.²⁷ To my mind, it provides the clearest direction for the development of a systemic regulatory regime that actively promotes

²³ Van der Walt AJ *Property and constitution* (2012) 21.

²⁴ Consider for example Froneman J's reference to German constitutional property law in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 52-56.

²⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 42-43; Alexander GS "Property as a fundamental constitutional right? The German example" (2002-2003) 88 *Cornell Law Review* 733-778 738. This point is discussed in more detail in Chapter 3.

²⁶ Kimminich O "Property rights" in Starck C (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 75-91 79.

²⁷ Consider for example *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14-17. Also see Van der Walt AJ *Property and constitution* (2012) 20-24, 130; Mostert H *The constitutional protection and regulation of property and its influence on the reform of private law and land ownership in South Africa and Germany* (2002) 578-580.

the norms and values of the Constitution. The systemic constitutional approach means that the constitutional protection of entitlements is derived from and circumscribed by the entire Constitution, and special considerations might have to be taken into account when the subject matter of regulation is property – regardless of the field of law where the regulatory measure originates. Additionally, it requires the area of application of each field of law (and for purposes of this dissertation, each secondary regulatory framework) to be clearly set out so that there are no unnecessary or unjustified parallels or overlaps in the constitutional legal system.

One of the aims of the property clause in the Bill of Rights is to find an appropriate balance between the interests of the individual and the interests of society. Section 25(1) allows non-arbitrary deprivations of property to ensure that state regulation of the use, exploitation and enjoyment of property is possible and legitimate to further constitutional objectives, whilst also affording adequate protection to property holders against arbitrary infringements.²⁸ The relationship between property and regulation must be aligned across different areas of the law, to ensure that the same underlying approach is followed, regardless of whether regulatory measures are challenged in terms of PAJA or section 25(1). In the following section the subsidiarity principles are considered to determine how they can ensure that the overlap between section 25 and 33 of the Constitution is addressed in a non-arbitrary manner.

²⁸ Van der Walt AJ *Property and constitution* (2012) 142.

4 2 2 *Subsidiarity principles*

Constitutional supremacy and the single-system-of-law principle necessarily impact on how the various sources of law are dealt with in South African law.²⁹ Van der Walt argues that the Constitutional Court developed “a set of guidelines” to determine which source of law applies to a dispute and that these guidelines can be further developed.³⁰ Elaboration of these guidelines is necessary to ensure that the source of law that is most likely to promote the spirit, purport and object of the Bill of Rights is selected.³¹ Stated differently, subsidiarity principles provide guidance when dealing with more than one potentially applicable source of law and ensure selection of the source that will contribute to the development of a single system of law that exhibits the desired characteristics envisioned by the Constitution.³²

The first subsidiarity principle states that if a litigant avers the infringement of a constitutional right and legislation has been specifically enacted to give effect to that right, the litigant must base his claim on the legislation and cannot rely on the constitutional provision directly.³³ In terms of the second subsidiarity principle, a litigant may not choose to

²⁹ Van der Walt AJ *Property and constitution* (2012) 23, 26. The Constitution recognises the common law, legislation, customary law and international law as possible sources of law.

³⁰ Van der Walt AJ *Property and constitution* (2012) 23-24 refers to this as “the development algorithm of post-apartheid South African law”. Also see in general Van der Walt AJ “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 *Constitutional Court Review* 77-128.

³¹ Van der Walt AJ *Property and constitution* (2012) 35. Also see Du Plessis L “‘Subsidiarity’: What’s in the name for constitutional interpretation and adjudication?” (2006) 17 *Stellenbosch Law Review* 207-231 209 for an explanation of the different kinds of subsidiarity (institutional subsidiarity and strategic subsidiarity) which impact on adjudicative subsidiarity.

³² Van der Walt AJ *Property and constitution* (2012) 35; Van der Walt AJ “Tradition on trial: A critical analysis of the civil-law tradition in South African property law” (1995) *South African Journal on Human Rights* 169-206 203-205.

³³ Van der Walt AJ *Property and constitution* (2012) 36. This principle is derived from *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) paras 93-96.

rely on the common law where legislation has been specifically enacted to protect the right in question.³⁴

This seems relatively clear and uncomplicated. However, each principle is subject to a proviso. The first principle does not apply if the litigant wishes to challenge the specifically enacted legislation for being “unconstitutional or inadequate in protecting the right”, which means that in this case a litigant may rely on the constitutional provision directly.³⁵ An inferred proviso to the second principle is that a litigant may rely on the common law if the legislation was not intended to cover a particular aspect of the law, or if it was intended to cover an entire field, but in fact does not cover a particular aspect of the common law. However, the common law can only be applied insofar as the common law does not conflict with the constitutional provision or negate the aims and objectives of the relevant legislative scheme.³⁶

As mentioned above, PAJA was enacted to give effect to section 33 of the Constitution. In terms of the subsidiarity principles, this would mean that a litigant in a case involving administrative action is precluded from relying on section 33 directly, and must instead make use of the applicable provision(s) in PAJA,³⁷ unless the litigant wishes to challenge the

³⁴ Van der Walt AJ *Property and constitution* (2012) 36 refers to several important Constitutional Court decisions where these principles were formulated, including *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25 and *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 96. Both decisions are discussed in more detail below.

³⁵ Van der Walt AJ *Property and constitution* (2012) 36 formulates this proviso with reference to the following cases: *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 437; *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC) para 249; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15.

³⁶ Van der Walt AJ *Property and constitution* (2012) 36.

³⁷ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 119, 134.

constitutionality of the provision(s) in PAJA.³⁸ In the latter case the litigant would rely directly on section 33 of the Constitution.³⁹

However, it must be borne in mind that PAJA was not enacted to give effect to section 25 and therefore the first subsidiarity principle does not provide an answer in disputes regarding the appropriate path or source of law where property is regulated through administrative action.⁴⁰ It is thus not always clear whether a litigant can argue that, under certain circumstances, section 25 would offer wider protection to her constitutionally protected rights than the applicable provisions of PAJA, and that she should therefore be at liberty to choose to rely on section 25 directly.⁴¹

³⁸ Van der Walt AJ *Property and constitution* (2012) 36; Hoexter C *Administrative law in South Africa* (2nd ed 2012) 119. Also see the discussion by Hoexter C “Clearing the intersection? Administrative law and labour law in the Constitutional Court” (2008) 1 *Constitutional Court Review* 209-234 regarding the selection of sources and the creation of multiple pathways of review, particularly in the context of administrative law and labour law.

³⁹ The post-PAJA role of section 33, for anything other than challenging the provisions of PAJA, is unclear. Klaaren and Penfold argue that section 33 continues to fulfil a meaningful role in the development of administrative law and that a “free-standing right to just administrative action still exists”. See Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-10, who explain that, if this approach is accepted, three possible applications of section 33 are possible: firstly, section 33 can play a role in interpreting the provisions of PAJA where more than one interpretation is possible. Secondly, section 33 can form the basis on which to challenge the constitutionality of the provisions in PAJA and, thirdly, as a ground on which to challenge the constitutionality of other legislation or to assist with the interpretation of other legislation that impacts on the right to just administrative action. Also see Hoexter C “Just administrative action” in Currie I & De Waal J (eds) *The bill of rights handbook* (6th ed 2013) 643-690 649-651.

⁴⁰ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 67. There is also no single, comprehensive piece of legislation intended to give effect to section 25 of the Constitution, such as the Labour Relations Act 66 of 1995 which was promulgated to give effect to section 23 of the Constitution. There is no “purpose-built (legislative) framework” for property matters, and therefore issues regarding subsidiarity are more complicated when the subject-matter of regulation is property. For a discussion of what amounts to subsidiarity in the context of administrative action in the labour context, see *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) para 41.

⁴¹ Van der Walt AJ *Property and constitution* (2012) 43-44; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 66-69.

Another complicating factor when dealing with section 25 and section 33 and the application of the subsidiarity principles, is that the case law and academic literature do not always clearly distinguish between direct statutory deprivation (where no administrative decision is necessary, because the deprivation is a direct result of the legislation)⁴² and situations where there is authorising legislation but no deprivation results automatically because a decision by an administrator is necessary to cause the deprivation.⁴³ This issue is considered in more detail below.

4 2 3 *The regulation of regulation: The problem of more than one potential regulatory system*

In Chapter 3, I refer to some of the features of the constitutional legal system, with reference to property and regulation as sub-components of the system. The constitutional analysis showed that the constitutional legal system provides for secondary regulatory control of the imposition of limitations ('the regulation of regulation'), to ensure that limitations on

⁴² For example in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC); *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC). This is referred to as *ex lege* deprivation.

⁴³ For example *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC); *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC). See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 267.

property meet the prescribed requirements and that the effects of the limitations can be justified.⁴⁴

Regulation of the use of property in the constitutional setting gives rise to a problem that has thus far remained largely unanalysed. The problem is that the use of property is sometimes regulated by administrative action, but not always. Regulatory limitations can also be imposed directly on property by operation of law (with no administrative action) through the common law, legislation or the Constitution, or by acts of the judiciary or the executive. This means that not all instances of regulation can be challenged or reviewed in the same way, or on the same basis. It is therefore necessary to determine when a regulation dispute will be adjudicated in terms of PAJA, and when a litigant can (or should) rely directly on section 25 of the Constitution.

In South African constitutional law, this secondary regulatory function can be carried out within the regulatory framework provided for by section 25 of the Constitution, or alternatively, within the framework created by section 33 of the Constitution together with PAJA. In the systemic constitutional approach, it must be accepted that both these systems fulfil some distinct purpose, in a way that does not allow for the creation of parallel systems.⁴⁵ Given the subsidiarity principles, the regulation of regulation should primarily be an issue of administrative law, unless the source or authority of the primary regulation (the regulation of the use of property) excludes that option. In such a case, the next option is direct reliance on constitutional principles, which include but are not limited to the constitutional property principles of section 25.

⁴⁴ The notion of the “regulation of regulation” stems from administrative law. See Farina CR “Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power” (2004) 19 *South African Public Law* 489-512 490.

⁴⁵ The notions of parallel legal development and parallel systems are discussed in section 4.5 below.

In the systemic constitutional approach there is a further step, namely to consider the relationship (if any) between the secondary regulatory systems after the appropriate system has been selected. This chapter shows that because of the interconnectedness of the sub-components of the constitutional legal system, there is often direct and indirect interaction between the regulatory systems, even after the decision regarding application has been made. Before I discuss this interaction, the next section provides background information on the relevant administrative law rules and principles applicable to the regulation of property. The aim of the following section is not to restate elementary administrative law, but rather to create the appropriate context within which to further explore the link (or lack thereof) between property and the right to just administrative action.

4 3 The right to just administrative action in the property law context

4 3 1 Reconsidering the relationship between property law and administrative law in light of the Constitution

Section 33 of the Constitution represents an important milestone in the development of South African administrative law, insofar as it entrenches the right to administrative action that is lawful, reasonable and procedurally fair. South Africa is therefore in the process of developing its common law heritage to create constitutional administrative law which reflects the constitutional commitment to justification, transparency and efficiency.⁴⁶ There are many new developments in administrative law which aim to promote these objectives and transcend its common law heritage, but for purposes of this dissertation it will suffice to consider how

⁴⁶ See for example sections 1(d), 33(3)(c), 41(c) and 195 of the Constitution.

reasonableness and procedural fairness have developed under PAJA and section 33, and determine how these developmental trends have impacted on property.

Traditionally, property law and administrative law have a strained relationship, because of each area of law's perceived function in terms of the common law. From a liberal (and absolutist) perspective, administrative law should preferably be largely absent from the sphere of property law insofar as it represents an intrusion of the public sphere on the private sphere. However, property and administrative justice are both fundamental rights in the Bill of Rights and therefore it is necessary to reconceive the relationship between private property and the administration, and for administrative law to adopt a more facilitative role in the context of the regulation of the use of property. This is particularly important in the systemic constitutional approach because regulation is a systemic device that can promote a variety of constitutional objectives. The principles of administrative law can assist with this task.

Administrative law, as the sphere of law to give effect to section 33 of the Constitution, cannot be left under-theorised or under-developed in the constitutional context. However, because this dissertation is centred on the regulation of the use of property, these issues cannot be addressed in detail. Instead, I discuss the potential for development in the area of overlap between section 25(1) and section 33, and merely highlight some of the potential implications for non-overlap areas and parallel developments in the broader context of the single-system-of-law principle.⁴⁷

⁴⁷ The systemic perspective that is central to this study in the context of the regulation of property is also of considerable importance to the reconceptualisation and development of the role of administrative law under the Constitution; there are important consequences to viewing administrative law as a system of regulation, although the implications are not fully worked out in this dissertation. See Farina CR "Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power" (2004) 19 *South African Public Law* 489-512 490.

4 3 2 *Administrative law principles impacting on the regulation of property*

In the constitutional paradigm, administrative law as the regulation of regulation has an important role to play in the regulation of property.⁴⁸ However, its precise role and function in the constitutional framework and its role *vis-à-vis* section 25 of the Constitution have arguably not been considered in enough detail. In this section, general administrative law principles that impact on property are set out and discussed as a point of departure, to briefly set out what the regulatory controls of the administrative law framework look like.

“Administrative action” is a term of particular significance for the right to administrative justice entrenched in section 33 of the Constitution.⁴⁹ Both section 33 of the Constitution and PAJA expressly refer to administrative action, with the effect that judicial review in terms of PAJA can only take place if the offending exercise of public power meets the “requirements” of an administrative action.⁵⁰ Certain academics, such as Hoexter and Quinot, argue that administrative justice should be used as a central or systemic concept around which to build this new body of law.⁵¹ Unfortunately, the focus up to now has fallen on what qualifies as

⁴⁸ Farina CR “Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power” (2004) 19 *South African Public Law* 489-512 490; Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 94.

⁴⁹ Section 33 of the Constitution. Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-20 describe it as the “crucial threshold concept” to administrative law review. Also see Hoexter C *Administrative law in South Africa* (2nd ed 2012) 172.

⁵⁰ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 173.

⁵¹ See in general Quinot G “The right to reasons for administrative action as key ingredient of a culture of justification” (2011) 25 *Speculum Iuris* 32-47 32-33; Quinot G “Substantive reasoning in administrative law adjudication” (2010) 3 *Constitutional Court Review* 111-139 115-117; Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 641; Hoexter C “Judicial policy revisited: Transformative adjudication in administrative law” (2008) 24 *South African Journal on Human Rights* 281-299 286-288. Also see Henrico R “Re-visiting the rule of law and the principle of legality: Judicial nuisance or licence?” 2014 *Tydskrif vir die Suid-Afrikaanse Reg* 742-759 753.

“administrative action” and the burdensome conceptualisation of this term has led to unfortunate consequences, which are discussed in more detail below.

Administrative action is defined in section 1 of PAJA and has been discussed extensively in case law and academic literature.⁵² While it is important to identify whether an action qualifies as administrative action, especially in relation to the determination of the applicable source of law, an in-depth analysis of the interpretation of the term is not necessary for this dissertation.⁵³ In *Joseph and Others v The City of Johannesburg and Others*⁵⁴ it was decided that a broad and purposive interpretation of administrative action is preferable, to include as many public actions as possible within the ambit of judicial review in terms of PAJA.⁵⁵ However, given the highly complex nature of the definition of “administrative action” in section 1 of PAJA, it is possible that certain public acts that affect property will not technically qualify as administrative action, and therefore will not be subject to scrutiny under PAJA, which means that they will be dealt with under section 25(1) directly.⁵⁶

⁵² See *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 21, where the definition is described as “cumbersome”. See also Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-20 – 63-25, 63-59 – 63-76.

⁵³ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 134 argues that the first step in any administrative law case ought to be to determine whether there was administrative action to decide whether PAJA is applicable or not. This view is not necessarily always embraced by the courts. See for instance *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) paras 80-81 where the application of PAJA was viewed as a difficult question that need not be decided in every case. See further Murcott M “Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?” (2013) 130 *South African Law Journal* 260-274 265-267.

⁵⁴ 2010 (4) SA 55 (CC). Hereafter referred to as *Joseph*.

⁵⁵ *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) paras 27-28. This approach was first formulated by the Supreme Court of Appeal in *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA).

⁵⁶ One possible example in this category is the Constitutional Court's decision in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC), where it was held that the publication of notices did not amount to administrative action.

One further aspect of the definition of “administrative action” in section 1 of PAJA is of significance to this chapter, namely that administrative action is a decision (or a failure to take a decision) that *adversely* affects the rights of any person. This is closely connected to the terminology in sections 3 and 4 of PAJA, which require that any administrative action which materially and adversely affects the rights of a person or the public, or the legitimate expectations of a person, must be procedurally fair.⁵⁷

It is important to establish when the regulation of property materially and adversely affects the rights or legitimate expectations of any person or the rights of the public, as required by sections 3 and 4 of PAJA, respectively, to determine whether the interpretation of the phrase “materially and adversely affect” corresponds with the jurisprudence on section 25 and the definition of deprivation developed there.⁵⁸

The interpretation of the verb “affect” is not a simple matter and two different interpretations (with vastly different consequences) have been suggested.⁵⁹ One option is to interpret the phrase “adversely affect” to refer to an action that *determines* the rights of a person.⁶⁰ This is referred to as the determination theory, a term coined by Mureinik.⁶¹ It is

⁵⁷ *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 23. The confusing reference to “material” effects in sections 3 and 4 of PAJA (with no corresponding requirement in section 1) was clarified by Skweyiya J in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 31. It is now understood to mean that the adverse effect must not be of a trivial nature. See Hoexter C *Administrative law in South Africa* (2nd ed 2012) 398.

⁵⁸ To review a decision under PAJA the decision or failure to take a decision must adversely affect the rights of a person. Sections 3 and 4 of PAJA specify that administrative action that materially and adversely impacts on the rights or legitimate expectations of a person or the rights of the public must be procedurally fair. Access to these “procedural fairness provisions” is thus contingent upon proving that rights (or legitimate expectations in the case of section 3) were materially and adversely affected and will hinge on the interpretation assigned to that phrase.

⁵⁹ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 221.

⁶⁰ Mureinik E “Reconsidering review: Participation and accountability” 1993 *Acta Juridica* 35-46 36. Also see Hoexter C *Administrative law in South Africa* (2nd ed 2012) 221.

⁶¹ Mureinik E “Reconsidering review: Participation and accountability” 1993 *Acta Juridica* 35-46 36.

based on a generous interpretation of the requirement, since any “decision which decides what a person’s legal rights are” would then fall within the ambit of “affecting” those rights.⁶² The second interpretation is much stricter or narrower and requires the taking away or abolition of rights.⁶³ In other words, a decision will only affect rights if the decision in question deprives a person “of a prior legal right”.⁶⁴ While the wording of PAJA does not clearly indicate which approach is preferable, Hoexter argues convincingly that the rights in section 33 of the Constitution are not qualified in the same manner as in PAJA and that adherence to the deprivation theory would actually render PAJA unconstitutional, because it fails to properly give effect to section 33.⁶⁵

The phrase “material and adverse impact”, especially if interpreted according to the stricter deprivation theory, echoes a concern raised in Chapter 3 of this dissertation, namely that the language of post-1994 legal instruments, such as PAJA in this case, creates the perception that the regulation of the use of property is an exceptional imposition that diminishes the abstract completeness of a right previously held, in line with the absolutist approach to regulation. While this may not be problematic for a number of rights affected by administrative action, an absolutist approach to the administrative regulation of the use of property is potentially problematic because it arguably supports an interpretation of property

⁶² Mureinik E “Reconsidering review: Participation and accountability” 1993 *Acta Juridica* 35-46 36.

⁶³ This is the deprivation theory. See Hoexter C *Administrative law in South Africa* (2nd ed 2012) 221, 403, where she argues that the Constitutional Court’s adjudicative approach in *Walele v City of Cape Town* 2008 (6) SA 129 (CC) can be read in support of the deprivation theory. Also see Govender K “An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa” (2003) 18 *South African Public Law* 403-429 413, who is of the opinion that a burden or prejudice must be imposed to satisfy the requirement for an adverse effect on rights.

⁶⁴ Mureinik E “Reconsidering review: Participation and accountability” 1993 *Acta Juridica* 35-46 36.

⁶⁵ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 221. In the case law there has also been a preference for the determination theory. See for example *Scalabrino Centre Cape Town v Minister of Home Affairs* [2012] ZAWCHC 147 (25 July 2012); *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).

that is not compatible with the way in which “deprivation” is interpreted in section 25 of the Constitution. It shifts the focus to the justification of the existence of limitations, instead of focusing on the requirements for valid regulation and justification for its effects. The latter focus is more appropriate in the constitutional setting, because the point of departure is that all rights are constitutionally-framed and therefore held subject to the inherent possibility of regulation. The language in PAJA highlights the importance of adopting a systemic approach to the regulation of the use of property in the constitutional context, since regulation is a constitutional device that fulfils a variety of functions in the constitutional system, and the underlying theoretical approach should be consistent across the system.

When considering the case law dealing with the interpretation of “material and adverse effect”, it seems as though the requirement is easily met.⁶⁶ In the property law context, this could mean any regulatory action that amounts to deprivation of property will also materially and adversely affect the rights of a person or the public, since in effect any change or even the mere capacity to affect rights in future would suffice to satisfy the requirements.⁶⁷ Van der Walt raises the possibility that the courts might require a litigant to prove that her section 25(1) right had been materially and adversely affected in order to gain access to PAJA’s

⁶⁶ See for example *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 23, where it was held that the adverse effect on rights required by the definition of administrative action was not only an immediate or immediately threatening impact resulting from a decision, but referred also to conduct that only had the capacity to affect rights in future. This *obiter* statement by the Supreme Court of Appeal was confirmed in *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 37 and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 60. Also see the remarks by Chaskalson P in *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para 101 where the “tentative” view is expressed that procedural fairness might be a requirement for administrative decisions affecting “a material interest short of an enforceable or prospective right”. But see Hoexter C “The principle of legality in South African administrative law” (2004) 4 *Macquarie Law Journal* 165-185 179 where it is pointed out that these remarks by Chaskalson P was made without specific reference to PAJA.

⁶⁷ *Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 23.

procedural fairness provisions, which would make it necessary to prove that she had been *arbitrarily* deprived of property in terms of section 25(1) and, if that can be proven, recourse to PAJA might not be necessary.⁶⁸ While this may be true where a claim is based on a litigant's section 25(1) right, PAJA's scope is potentially much broader and could also be applicable where a property right (as understood in the private law context) or a legitimate expectation had been affected by administrative action.⁶⁹

The protection of expectations is a complicated (and to a certain extent controversial) theme in both property law and administrative law. The principles of property law offer substantive protection for what is sometimes referred to as the reliance interest in property.⁷⁰ However, not every expectation is recognised as property in terms of section 25(1),⁷¹ nor is every expectation protected as a legitimate expectation in administrative law.⁷² The expectations that can be protected through property law are not the same as the "legitimate

⁶⁸ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 267-268; Van der Walt AJ "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 92.

⁶⁹ See Govender K "An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa" (2003) 18 *South African Public Law* 403-429 414, where it is explained that all "pre-existing" rights, such as contractual, delictual and property rights will qualify as rights under PAJA. In *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) a generous interpretation of rights was clearly preferred, since the Constitutional Court did not require a contractual right but was willing to base the applicants claims on the rights that flowed from the local government's constitutional and statutory duties to provide services.

⁷⁰ Singer JW "The reliance interest in property" (1988) 40 *Stanford Law Review* 611-751 622; Davidson NM "Property's morale" (2011) 110 *Michigan Law Review* 437-488 439; Lovett JA "Property and radically changed circumstances" (2007) 74 *Tennessee Law Review* 463-566 475-476.

⁷¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 119, 123. As far as so-called "new property" is concerned (an area where legitimate expectations feature), both German and US law only recognise and protect certain expectations in property law, for instance an expectation that is somehow supported by own investment. However, even where the expectation includes "own investment", it would only entitle the holder to due process protection in US law. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 167; Van der Walt AJ "Protecting social participation rights within the property paradigm: A critical reappraisal" in Cook E (ed) *Modern studies in property law: Volume 7* (2003) 27-41 28.

⁷² Hoexter C *Administrative law in South Africa* (2nd ed 2012) 421.

expectations” as understood in terms of section 3 of PAJA,⁷³ although the underlying justification for a measure of protection may be similar.⁷⁴ In terms of PAJA, legitimate expectations can be protected, but an applicant is usually only entitled to procedural relief.⁷⁵

One final aspect worth mentioning is that of remedies. Section 8 of PAJA sets out a list of the possible remedies that are available in judicial review proceedings. Although the list is extensive, the essence of review proceedings remain focused on procedural aspects and not on substantive relief. In this sense there may be a significant difference in outcome, depending on the source of law that is applied to a matter. In the next section the common features of both fields of law in relation to the regulation of property are set out.

4 4 Overlap and non-overlap cases

Within a complex system, such as the legal system, there are many sub-components and interdependencies between sub-systems.⁷⁶ It is also to be expected that there would be some

⁷³ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 421 is of the opinion that the interpretation of legitimate expectations in section 3 of PAJA is informed by case law that was decided on the topic before PAJA came into force and that “pre-PAJA” case law still inform the development of legitimate expectations in South African law.

⁷⁴ Possible reasons for protection include reliance, accountability and rationality. See *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) paras 63-65. Also see Brand D & Murcott M “Administrative law” (2013) 2 *Juta’s Quarterly Review* 2.3.4.

⁷⁵ However, in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) the Constitutional Court also effectively provided substantive relief, although it held that it was not in fact developing a doctrine of substantive protection for legitimate expectations. See the discussion by Brand D & Murcott M “Administrative law” (2013) 2 *Juta’s Quarterly Review* 2.3.4 where it is explained that government is held to its promises (under certain circumstances) for reasons of accountability and reliability. Allowing revocation would amount to irrationality and although it resembles a doctrine of substantive legitimate expectations, it seems to be an altogether new legal construct that resembles the Court’s approach in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).

areas of overlap in a system, but for a system to be efficient, sustainable and to develop holistically, the areas of overlap should be justifiable, and not the result of careless development. The dangers of parallel development within the system are addressed below, but it is necessary to first set out here the area of overlap that forms the focus of this chapter, namely the overlap between the regulation of property and the right to just administrative action. However, case law shows that it is not enough to set out the potential overlap, because the overlap might not be readily identifiable. Case law also shows that even in non-overlap cases, there is a relationship between property and administrative justice, with the principles of administrative law being applied to non-administrative action cases. Therefore I also explore the importance of developments in non-overlap areas for two reasons: firstly to determine whether similar constitutional values are pursued in non-overlap areas, and secondly to establish what the advantages are of keeping developments in both overlap and non-overlap cases linked in some way.

The idea of overlap and non-overlap cases was first raised by Quinot and Liebenberg. They were specifically interested in reasonableness as a constitutional notion that features in two constitutional contexts, namely as a standard of review in socio-economic rights and in administrative justice jurisprudence.⁷⁷ Quinot and Liebenberg note that the relationship between the development of reasonableness in these two areas of law was largely left unanalysed and viewed as two distinct legal developments. The authors argue that reasonableness, properly understood, represents a single, coherent model of review that can potentially give substantive content to socio-economic rights. Their analysis shows the extent to which substantive considerations can be taken into account in judicial review, and highlights the importance of developing “a truly post-constitutional conception of

⁷⁶ Refer to Chapter 5 for a brief discussion of general systems theory.

⁷⁷ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 639-641.

administrative-law review”, to reflect a constitutional understanding of the role of administrative-law review “as part of administrative justice within a justiciable bill of rights.”⁷⁸

I discuss “overlap” and “non-overlap” cases in this chapter specifically in the context of property law and administrative law. “Overlap” cases refer to cases where both property law and administrative law are applicable, in other words cases involving review of administrative action that impact on property,⁷⁹ while “non-overlap” cases refer specifically to cases where the matter falls within the ambit of either property law or administrative law, but not both. For purposes of this dissertation, non-overlap cases would typically be cases where the regulation of the use of property involves no administrative action, but it can also refer to cases that do not focus on property as such, but that can still have an impact on the approach to the regulation of property indirectly. Overlap cases, as well as related developments in non-overlap cases, present opportunities to align the development of constitutional notions such as reasonableness and non-arbitrariness, and to consider the (possible) justification for existing parallel developments. The rest of this chapter therefore attempts a similar undertaking as that of Quinot and Liebenberg, with reference to developments in section 25(1) and administrative justice jurisprudence.

In overlap cases (cases where administrative action has an impact on property) the subsidiarity principles indicate that the applicable regulatory framework is that of PAJA. Property law principles will have some role to play in these cases, but the interaction between the regulatory systems is usually not problematic, since administrative law almost always

⁷⁸ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 641.

⁷⁹ The overlap between sections 25 and 33 occurs in various areas of law, including for instance expropriation law, planning law and environmental law.

works with a “substantive regulatory program”.⁸⁰ The nature of administrative law is to regulate “the process by which regulation occurs”.⁸¹ However, the relationship between the substantive content of the property-related regulation and the regulatory framework of PAJA is not the focus of this chapter.

Another dimension of interaction refers to Quinot and Lienbenberg’s argument regarding the normative content of reasonableness review under PAJA. In the context of the regulation of the use of property, property law principles can influence the normative content of the administrative-law review, although section 25(1) does not function as the constitutional framework of control over the regulation itself. This means that both section 25 and 33 of the Constitution can be applicable to a dispute where regulation is brought about by administrative action, but PAJA is the framework that fulfils the secondary regulatory function.

Where PAJA is applicable, litigants should not be permitted to sidestep its provisions and rely directly on section 25 (to obtain some advantage or because of practical difficulties with basing their cause of action on PAJA) since this can have unintended systemic consequences. This point can be illustrated with reference to *Arun Property Development (Pty) Ltd v City of Cape Town*.⁸² In Chapter 1, I explain how the facts of the *APD* case show how difficult it is to determine the appropriate framework to fulfil the secondary regulatory function.⁸³ The Constitutional Court briefly considered the possibility of adjudicating *APD* with reference to the provisions of PAJA, but concluded that the developer would face “a legion of obstacles”

⁸⁰ Consider *Walele v City of Cape Town* 2008 (6) SA 129 (CC) as an example of this interaction. Also see Farina CR “Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power” (2004) 19 *South African Public Law* 489-512 490.

⁸¹ Farina CR “Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power” (2004) 19 *South African Public Law* 489-512 490.

⁸² 2015 (2) SA 584 (CC).

⁸³ Refer to the discussion in Chapter 1.1.

with administrative judicial review, and opted to rely on the framework of section 25(2) instead. These obstacles included the 180-day time bar in PAJA, difficulty with finding a decision to impugn and the possible review grounds in PAJA. The Court also referred to the question of whether Arun was obliged to first seek review or to exhaust other possible remedies before seeking compensation.⁸⁴ It is questionable whether the Court's reasoning regarding the practical difficulties with bringing a case for judicial review is convincing, especially given its previous statement in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*⁸⁵ that practical difficulties with PAJA do not justify side-stepping its provisions.⁸⁶ The confusion that *APD* left in its wake regarding the existence of a doctrine of constructive expropriation and the status of *ex lege* expropriation shows that it might have been preferable if the Court had faced the practical difficulties of applying PAJA head-on. Because of Arun's interest in claiming compensation for the *ex lege* transfer of excess land, they framed their case as an expropriation challenge with reference to section 25(2) of the Constitution. The single-system-of-law principle, together with the subsidiarity principles, indicates that this preference should not necessarily be allowed. Systemically, there are good reasons for limiting litigants' choice of cause of action to avoid the (unjustifiable) creation of parallel paths of litigation.⁸⁷

⁸⁴ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) paras 11-12, 24-28, 66. Arun applied for variation of some of the conditions, but did not challenge (in the form of appeal or review) the decisions to impose the conditions or make the approval subject to compliance with the said conditions relating to road designs. The City contended that compensation was not an appropriate remedy because Arun did not exhaust all other remedies – they did not attempt to amend the structure plan, nor did they challenge the lawfulness of the plan or the conditions by means of the mechanism provided for in the legislation.

⁸⁵ 2014 (3) SA 481 (CC).

⁸⁶ See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 83 where the Court refers specifically to the 180-day time bar in PAJA.

⁸⁷ Parallel legal development is discussed in more detail in the following section.

In non-overlap, non-administrative action cases (where the use of property is regulated *ex lege* by the common law, legislation or the Constitution, or through acts of the executive) PAJA is not applicable and a different regulatory system should “regulate the regulation”. The most obvious option is the regulatory framework of section 25 of the Constitution, and with reference to acts of the executive, the principle of legality.⁸⁸ However, the complicating factor in these typical non-overlap cases is that the principles of administrative law are often still applied indirectly, despite the lack of administrative action.⁸⁹ I return to this point below.

A recent example that highlights the importance of engaging with the area of overlap between regulation and administrative justice is *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others*.⁹⁰ In the *Shoprite* case an existing regulatory regime was amended by the Eastern Cape Liquor Act,⁹¹ with the consequence that certain categories of rights under the previous regime were abolished. What was challenged was “a legislative change to the regulatory framework for the sale of liquor, not its administrative enforcement.”⁹² However, the role of administrative law was potentially relevant in a different context, as appears from Moseneke DCJ’s judgment. Moseneke DCJ points out that not all interests need protection as “property” for purposes of section 25(1) of the Constitution, because of South Africa’s

⁸⁸ The role and relevance of the principle of legality is discussed in section 4.6.2 below.

⁸⁹ See for example *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) paras 65-67; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 39-47. Also see Hoexter C *Administrative law in South Africa* (2nd ed 2012) 255.

⁹⁰ [2015] ZACC 23 (30 June 2015). Hereafter referred to as *Shoprite*.

⁹¹ 10 of 2003.

⁹² *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 30.

expansive Bill of Rights, especially the expansive administrative justice protections.⁹³ Here we see the interplay between constitutional property law and administrative justice, not to determine the appropriate regulatory framework to review the regulation of the use of property, but as an antecedent question to determine whether an interest ought to be recognised as property at all.

The implications of the tendency to not explicitly address and engage with the area of overlap between the regulation of the use of property and administrative justice are discussed in more detail below. Ultimately, the area of overlap should not be seen in a negative light. Quinot argues in favour of a “constructive alliance” between provisions in the Constitution and explains that in order for such an alliance to develop the courts must engage with the possible overlaps, and consciously and meticulously develop the law to create a coherent system that reflects the “desired characteristics” envisioned by the Constitution.⁹⁴ In the next section, the problem of unjustified parallel developments in the constitutional legal system is set out in more detail.

4 5 Parallel development

The idea of a unified constitutional legal system (as opposed to a fragmented legal system) is a central theme of this chapter, where I consider a variety of legal developments and the extent to which they are judicially developed or extended, to the point where overlaps or parallels exist within the system.

⁹³ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 115.

⁹⁴ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 28. See Van der Walt AJ *Property and constitution* (2012) 26-34 for a discussion of the “desired characteristics” of the property law system in particular.

A number of potential parallel systems come to mind in the context of the regulation of the use of property. Firstly, there is the risk of two distinct systems developing on the basis of the Constitution and legislation, respectively. This is a parallel system in respect of the sources of law. Similarly, it is possible that parallel systems develop based on either the Constitution or legislation on the one hand, and the principles of the common law on the other.⁹⁵

The second potential parallel system is between fields of law, where the scope of application of two fields with reference to the applicability of the other area of law is not worked out properly. This can lead to so-called cherry-picking by litigants, which can result in similar cases having (unjustifiably) different outcomes. The obvious example for purposes of this dissertation is the regulatory frameworks created by section 25 and section 33 of the Constitution.

Closely related to this issue of parallel systems based on two fields of law, is the notion of parallel legal developments of constitutional notions. These parallel notions create problems for the single-system-of-law principle in the constitutional sphere, unless their existence can be justified. One example of this kind of parallel development is the notion of “meaningful engagement”. Meaningful engagement was arguably developed instead of building on existing principles of administrative law in the housing context. In section 4.6.4 below I consider the systemic implications of creating a parallel constitutional notion to function in a specific constitutional space, such as housing.

Below, I analyse the development of the following constitutional notions, namely legality, procedural fairness, procedural arbitrariness, procedural rationality, meaningful engagement, substantive arbitrariness, and reasonableness. The purpose of the discussion is to analyse the

⁹⁵ Consider the Supreme Court of Appeal’s approach of creating a constitutional remedy instead of developing the common law in *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA). Also see Van der Walt AJ *Property and constitution* (2012) 86.

content, application, similarities and differences between these notions, and also to consider the constitutional objective or value that is pursued by each of these constitutional notions. The most obvious advantage of linking developments across fields of law is the opportunity to further develop the single system of law under the Constitution. Toward the end of this chapter, I consider whether the principle of legality can provide the necessary “linking device” to align constitutional notions on a normative level.

As mentioned above, there are considerable advantages to be had by keeping developments in distinct fields somehow linked, although it is necessary to also consider whether there is something unique to the property context which would justify some extent of parallel development. Even a coherent system might offer different routes to get to the same place (or to reach the same objectives) and therefore the focus of the discussion below is to determine when the existence of alternative routes is problematic. Not all parallel developments are problematic, because there may be cases where parallel development is justified. One possible justification is development within a specific context as opposed to a more generic context, where specialised developments pursue constitutional commitments in different ways, with the result that the development is therefore not truly parallel, although it might appear parallel to existing mechanisms or principles at first. Considering property’s function in society and its close connection to other rights such as autonomy, dignity and equality, it is possible that there are instances where this justification might feature.⁹⁶ Giving special consideration (in the form of an alternative litigation route or special legal development) to cases where the subject-matter of regulation is property might be necessary in certain cases to combat the presumptive power of property and the weight of common

⁹⁶ Michelman FI “Liberal constitutionalism, property rights, and the assault on poverty” in Liebenberg S & Quinot G (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 264-281 276.

law.⁹⁷ However, despite property's social and economic value, it remains a right that is subject to limitation and the importance of property should therefore not be inflated for the wrong reasons.⁹⁸ Moseneke DCJ recently alluded to the "special" nature of property (albeit in a different context) when he stated that:

"[i]f a liquor licence is seen as 'property' then a strong entitlement is created in the hands of the licence holder. This would tip the scales and arguably diminish the ability of the Legislature to effectively regulate an industry where regulation is of paramount importance."⁹⁹

Although Moseneke DCJ's reasoning in this regard was aimed at the question of whether an interest (a liquor licence) ought to be recognised as property for purposes of section 25(1), it underlines the importance of how the relationship between property and regulation is conceptualised in light of the Constitution. Protection of an interest as property in terms of section 25(1) should not have the effect of insulating the interest from social control, in the form of statutory regulation. The view that a property right is fundamentally unregulated and protected to the extent of making regulation almost impossible is not in line with the notion of property as a constitutionally-framed right, which derives protection from the Constitution only to the extent which the system allows. This means that the level of protection awarded must be determined with reference to the rights in and normative framework of the Constitution as a whole.

⁹⁷ Singer JW *Entitlement: The paradoxes of property* (2000) 3; Michelman FI "Expropriation, eviction, and the gravity of the common law" (2013) 24 *Stellenbosch Law Review* 245-263 246, 253.

⁹⁸ Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15-106 62.

⁹⁹ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 120.

What makes the *Shoprite* case particularly interesting for purposes of this dissertation is that both Froneman J and Moseneke DCJ's judgments indicate the necessity of engaging with the role that property and regulation should play in the legal system and in society. Both judgments arguably include some systemic considerations, insofar as Froneman J finds in favour of a constitutional conception of property, and Moseneke DCJ considers what other (constitutional) mechanisms are available to protect the interest in question, without having to protect it as "constitutional property".¹⁰⁰ In this regard, Moseneke DCJ mentions South Africa's expansive notion of administrative justice, and its potential for addressing executive excess.

Parallel developments arguably arise when either the existence of an area of overlap between the regulatory systems is not recognised or when the relevance of a similar constitutional notion is overlooked. Cilliers (a proponent of complexity theory) explains that if a complex system is not properly structured, it can lead to random behaviour.¹⁰¹ When the area of overlap between areas of law or sources of law is not properly worked out, there is arguably too little structure ("too many degrees of freedom") which can lead to inconsistency.¹⁰² Therefore, the design of the structure of the system is of utmost importance. Van der Walt describes the desirable characteristics for a constitutional property system, and his work on the development of subsidiarity principles is arguably an attempt to create a suitable structure for the system to function in a non-arbitrary way.¹⁰³ The systemic

¹⁰⁰ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) 128-129. For an argument similar to Moseneke DCJ's reasoning, see Michelman FI "Liberal constitutionalism, property rights, and the assault on poverty" in Liebenberg S & Quinot G (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 264-281 710-713.

¹⁰¹ Complexity theory is discussed briefly in Chapter 5.2. See Cilliers P "Complexity, deconstruction and relativism" (2005) 22 *Theory, Culture & Society* 256-267 258.

¹⁰² Cilliers P "Complexity, deconstruction and relativism" (2005) 22 *Theory, Culture & Society* 256-267 258.

¹⁰³ Van der Walt AJ *Property and constitution* (2012) 23, 35-40.

constitutional approach proposes a methodology to address the area of overlap between property and administrative justice to incorporate greater structure into the constitutional property system, as a way of avoiding the arbitrary creation of parallel systems.

4 6 Developments in overlap and non-overlap cases

4 6 1 Background

The golden thread in the relevant case law is the acknowledgement that in constitutional disputes valid considerations and arguments are often put forth by both parties and what is needed is not necessarily a determination of entitlements, but rather a reconciliation or accommodation of competing values and interests.¹⁰⁴ This is a theme in administrative law, socio-economic rights and property law jurisprudence. However, it is clear from the haphazard development of certain principles, mechanisms and remedies that the courts respond to this challenge inconsistently and often without adequate consideration regarding the impact that the decision in a given case could have on the rest of the system of law.

There are two regulatory systems that regulate the imposition of limitations on property. The one framework is based on section 25 and property law principles; the other is based on

¹⁰⁴ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 640. See, for example, Dyal-Chand R “Sharing the cathedral” (2013) 46 *Connecticut Law Review* 647-723 655, 676-683 where the “interest-outcome approach” is proposed to resolve core property disputes. Dyal-Chand argues that the interest-outcome approach could potentially reconcile opposing interests in property by escaping the traditional focus on formal entitlements as the primary deciding factor. Explained briefly, the main focus of the court is not the determination and protection of formal title, but rather a more nuanced approach with three steps to reach an equitable outcome: firstly, determining all the legitimate interests in the relevant property; secondly, considering a variety of outcomes and determining which outcome could best accommodate each interest, and finally in the third step formal title is considered, where a court will have to decide how relevant formal title is to a dispute.

section 33 of the Constitution, together with PAJA. Although these two frameworks fulfil different functions, they remain interconnected and should ideally function and develop as a coherent whole, as sub-components of the system of regulation of the use of property in a constitutional legal system.¹⁰⁵

Quinot and Liebenberg explore similar issues in relation to the area of overlap between the right to just administrative action and various socio-economic rights. They explain that if administrative action impacts on a socio-economic right, that right determines (or at least influences) the normative context of reasonableness review.¹⁰⁶ This should arguably also be true for property, which is a fundamental right, albeit not a socio-economic right.¹⁰⁷ It is easier to see the connection and influence of developments in cases where there is an overlap between two areas of law, such as administrative law impacting on socio-economic rights, or in the context of this dissertation, where regulatory measures are imposed on the use of property by administrative action.¹⁰⁸ The link between two fields of law in non-overlap cases

¹⁰⁵ Van der Walt AJ *Property and constitution* (2012) 26-27.

¹⁰⁶ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 648.

¹⁰⁷ See Brickhill J & Ferreira N “Socio-economic rights” in Currie I & De Waal J (eds) *The bill of rights handbook* (6th ed 2013) 563-597 564, where it is explained that “traditional liberal rights”, such as the right to equality, liberty, property, free speech and assembly, are regarded as civil and political rights. Therefore, the right to property is usually not included in the broader term “socio-economic rights”, which refers to so-called second-generation rights that deal with basic living conditions and access to services. Because of the unique structure of the South African property clause (in terms of which property is protected in the classic liberal sense and then goes further to also set out a framework for land restitution and redistribution) section 25 does not fall neatly within either category and it is often discussed as a separate category. Property is not a fully-fledged second-generation right, but the social importance of property cannot be disregarded, and it is therefore arguable that at least some of the considerations that Quinot and Liebenberg discuss in the context of the relationship between developments in administrative law and socio-economic rights will also be applicable to similar developments in property law. This is discussed in more detail below.

¹⁰⁸ Consider for example the way in which the court engaged with both property law and administrative law in *Walele v City of Cape Town* 2008 (6) SA 129 (CC). In this case the area of overlap and the relationship between the two fields of law is relatively clear and uncomplicated.

is less obvious, but within the systemic approach it is important to consider the constitutional legal system in its totality. In the following sections, I argue that the developments in overlap as well as non-overlap cases are relevant with regard to the regulation of the use of property. The argument is based on descriptive and normative considerations, which are set out in more detail below.

In this section developments in overlap and non-overlap cases are analysed to identify the implications (if any) of these developments for the single-system-of-law principle. I discuss the following developments because of their apparent (but largely unanalysed) similarities or discrepancies. I limit the analysis to legality, procedural fairness, meaningful engagement, arbitrariness and reasonableness. The history and controversial aspects of each development are discussed only insofar as necessary to illustrate the possible links to and relationship with developments in other areas of the law, since an in-depth engagement with each concept is beyond the scope of this chapter.

4 6 2 *The role and function of the principle of legality*

The role of the principle of legality has been the topic of much debate. In this section I take a closer look at the content and function of this principle and consider its role in the constitutional legal system to determine how it functions in relation to the regulation of the use of property.

Legality serves two distinct purposes in South African law, firstly as an overarching and informing value that influences the interpretation and application of law,¹⁰⁹ and secondly as a

¹⁰⁹ Michelman FI “The rule of law, legality and the supremacy of the Constitution” in Woolman S & Bishop M *Constitutional law of South Africa (CLOSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 at 11-3 explains that legality is part of the rule of law which is referred to in section 1(c) of the Constitution.

free-floating basis to assess or review public conduct.¹¹⁰ All public power ought to be exercised in accordance with the principle of legality.¹¹¹ References to “legality” or “the principle of legality” abound in case law and academic texts, but different, although related, meanings are often attached to the term. For instance, legality is used in the context of assessing whether conduct is *legal*, referring to the lawfulness of the conduct. This type of reference is prevalent in planning law cases, for example, where the legality of building plans is often disputed.¹¹² But, as Price explains, legality refers to more than authority or lawfulness and can also serve as a ground for review of public actions (other than administrative actions) on the basis of their rationality.¹¹³ Rationality, as the substantive component of legality, is a

¹¹⁰ Michelman FI “The rule of law, legality and the supremacy of the Constitution” in Woolman S & Bishop M *Constitutional law of South Africa (CLOSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 at 11-2, 11-3 states that the claim to legality is now entrenched in the Constitution; it is not merely a left-over part of the common law that was carried over to the new constitutional dispensation. However, legality as a justiciable claim is not uncontroversial. Michelman explains that when the Constitutional Court first proclaimed legality as a possible ground for a claim, it was adjudicating on the basis of the Interim Constitution that differed textually from the final Constitution, insofar as it did not indicate that the rule of law was a constitutional value as such. Furthermore, the fact that such a provision now exists does not support treating legality as a free-floating or directly enforceable right, since in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) paras 21, 23 the Constitutional Court declared that the values in section 1(c) of the Constitution “do not give rise to discrete and enforceable rights” and no other provision is identified on which the claim to legality is based. See Price A “The content and justification of rationality review” (2010) 25 *South African Public Law* 346-381 370-372 regarding the question whether the rule of law is the appropriate constitutional basis for legality (as least for the rationality element of legality).

¹¹¹ See, for example, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58; *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 20. Also see Michelman FI “The rule of law, legality and the supremacy of the Constitution” in Woolman S & Bishop M *Constitutional law of South Africa (CLOSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 at 11-2.

¹¹² See for example Summers R “When certainty and legality collide: The efficacy of interdictory relief for the cessation of building works pending review proceedings” (2010) 13 *Potchefstroom Electronic Law Journal* 161-189 171.

¹¹³ Price A “The evolution of the rule of law” (2013) 130 *South African Law Journal* 649-661 656 refers to this as “constitutional legality”.

variable standard, much like reasonableness and arbitrariness, and can even include considerations of a procedural nature. This is sometimes referred to as “procedural rationality”.¹¹⁴ The decision of the appropriate intensity of constitutional rationality review is informed by two principles, namely the democratic principle and institutional competence.¹¹⁵

Case law shows that two aspects of the principle of legality are problematic; both are discussed in more detail below. The primary concern is that the content of legality is unclear. For example, several important court decisions reached different conclusions on whether or not legality includes a procedural fairness component. The second problematic aspect is determining the realm of application, or when litigants are allowed to rely on the principle of legality. Application of this principle has not been uniform, and the possibility exists that the principle of legality is used to circumvent the provisions of PAJA in conflict with the single-system-of-law principle.

Initially, legality was understood to mean that public power must be exercised in accordance with law, since the principle of legality was based on the rule of law.¹¹⁶ The content of the principle was expanded through case law, for example in *Pharmaceutical Manufacturers*, where the Constitutional Court held that it included a component of rationality.¹¹⁷ “[A]n expansive notion of legality” was introduced by Sachs J in his minority

¹¹⁴ See Bishop M “Vampire or priest? The listening constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*” (2009) 2 *Constitutional Court Review* 313-369 336; Price A “The evolution of the rule of law” (2013) 130 *South African Law Journal* 649-661 654.

¹¹⁵ Price A “Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*” (2010) 127 *South African Law Journal* 580-591 589.

¹¹⁶ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58. Also see Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-14.

¹¹⁷ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 90. *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC) para 81 indicates more clearly that there is not a separate principle of rationality, but rather that rationality should be understood as a component of the principle of

judgment in the *New Clicks (CC)* decision.¹¹⁸ This broad notion of legality includes a substantive reasonableness component as well as a procedural fairness component and expands the initial understanding of the principle of legality.¹¹⁹ However, in *Masetlha v President of the Republic of South Africa*¹²⁰ the Constitutional Court declined to extend the principle of legality to include a procedural fairness component.¹²¹ In light of the remarks by the majority in *Masetlha* it seems as though the content of the principle of legality can be regarded as settled, namely that it does not include a procedural fairness requirement.¹²²

legality. See Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-16.

¹¹⁸ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 612. Also see Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-16.

¹¹⁹ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) paras 611-640. Also see Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-16. This expansive notion of legality might, in certain cases, require a proportionality-type analysis. Price A “The evolution of the rule of law” (2013) 130 *South African Law Journal* 649-661 657-658 is critical of the extension of substantive rationality review as part of the principle of legality, especially when justification for the extension is somehow linked to the right to administrative action. According to Price, seeking justification in section 33 is a fundamentally flawed argument since judicial oversight on the basis of constitutional legality was specifically developed to regulate the exercise of public power that does not constitute administrative action. He refers to this development as the creation of a “parallel universe”.

¹²⁰ 2008 (1) SA 566 (CC). Hereafter referred to as *Masetlha*.

¹²¹ *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC) para 77. However, Ngcobo J (with Madala J concurring) dissented, stating that the principle of legality did provide a legal basis for a right to procedural fairness. Interestingly, Ngcobo J referred to the Constitutional Court’s interpretation of the term “arbitrary” to include a procedural component in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) and argued that *FNB* illustrates the point that procedural fairness is a part of the normative framework introduced by the Constitution. See especially paras 181-187 of Ngcobo J’s minority judgment in *Masetlha*. Also see the discussion by Klaaren J & Penfold G “Just administrative action” in Woolman S & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 4 (2nd ed RS 5 2013) 63-1 – 63-128 at 63-17.

¹²² See *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC) paras 77-81 where the Court emphasised the importance of effective and efficient government that must not be unduly

Nevertheless, the Constitutional Court revisited the issue of a procedural fairness element as part of the principle of legality in *Albutt v Centre for the Study of Violence and Reconciliation*.¹²³ In this case, participation was linked to the requirements for rationality instead of procedural fairness.¹²⁴ Moreover, Ngcobo CJ expressly emphasised the specific context of the particular case and the decision should therefore not be regarded as authority to include procedural fairness in the principle of legality generally.¹²⁵

As was mentioned previously, the application of the principle of legality is somewhat controversial. The principle of legality is a ground for review in circumstances where PAJA is not applicable to a matter, since all public power is subject to the rule of law.¹²⁶ However, recent case law suggests that litigants and judges are tempted to avoid PAJA, even where it is applicable, in favour of the more flexible principle of legality.¹²⁷ For purposes of this

restrained, while still placing the executive power within the framework of the Constitution. According to the majority judgment, procedural fairness is “a cardinal feature in reviewing administrative action”, not executive action, because a procedural fairness requirement for executive action would hinder effective governing.

¹²³ 2010 (3) SA 293 (CC). Hereafter referred to as *Albutt*.

¹²⁴ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 72. See the case discussion by Murcott M “Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?” (2013) 130 *South African Law Journal* 260-274.

¹²⁵ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) paras 75-76. See Hoexter C *Administrative law in South Africa* (2nd ed 2012) 419-420.

¹²⁶ *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO* 2005 (2) SA 530 (C). Also see Hoexter C *Administrative law in South Africa* (2nd ed 2012) 132, 137, 418.

¹²⁷ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 131, 134 explains that the principle of legality may be used to circumvent the time-restraints in PAJA, which sets a six month time limit to institute review proceedings. Hoexter also explains that the more onerous procedural rules for judicial review under PAJA might make review in terms of legality even more attractive. See Rules of Procedure for Judicial Review of Administrative Action (GN R966 GG 32622 of 9 October 2009) for more detail and to compare with the existing Rule 53 of the Uniform Rules that governs review based on the principle of legality. The new 2009 rules are not yet in operation, but see Quinot G “New procedures for the judicial review of administrative action” (2010) 25 *South African Public Law* 646-665 for a discussion and evaluation of the possible implications of the new rules.

dissertation, the question whether legality has any role to play in property regulation disputes is worthwhile to consider.

On the assumption that the principle of legality is only permissible as the basis for a claim when PAJA is not applicable, two scenarios come to mind regarding the regulation of property where legality could be relevant. Firstly, the principle of legality can be used as an independent cause of action to review executive action that has an impact on the use of property. Furthermore, because of the highly technical nature of the definition of administrative action in section 1 of PAJA, it is possible that certain actions that closely resemble administrative action might fail to meet the criteria for administrative action in terms of PAJA.¹²⁸ Consequently, the provisions of PAJA will not apply to the dispute and a litigant may decide to base her claim on the principle of legality instead of relying directly on section 25(1), although the advantage(s) of doing so are unclear. Secondly, the principle of legality in the narrower sense of authorisation can play a role in informing the “law of general application” requirement of section 25(1).

Perhaps a more likely scenario is the case alluded to above, namely that the provisions of PAJA are applicable to a dispute, but a litigant chooses to rely on the (arguably) more flexible principle of legality to attack the offensive administrative measure. Alternatively, in a case where PAJA ought to have been applied but that option is no longer available to a litigant because of the time-restraints in PAJA the litigant may opt to rely on the principle of legality.¹²⁹

¹²⁸ Price A “The evolution of the rule of law” (2013) 130 *South African Law Journal* 649-661 657.

¹²⁹ Section 7 of PAJA sets a time limit within which an application for review must be brought, but section 9 provides for a variation of that time frame under certain circumstances. The time constraints in PAJA was briefly mentioned in *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 66 as a reason why a matter should be dealt with in terms of a regulatory framework other than PAJA (in that case, section 25 of the Constitution).

Although legality could perhaps theoretically form the basis of a claim for review in these circumstances, the principle of legality has a very limited scope of application in cases where the property clause is applicable, because the wording of section 25 covers everything that would generally be covered by legality. The Constitutional Court interpreted section 25(1) in a wide and generous manner, and made provision for the possibility of thin rationality review or thick proportionality review under the substantive non-arbitrariness requirement. Section 25(1) accordingly requires lawfulness, reasonableness (in the form non-arbitrariness that goes further than the principle of legality) and even procedural fairness. Therefore, there is no need to resort to direct reliance on the principle of legality. However, where litigants rely directly on section 25, implicit reliance on legality via the constitutional provision might still be possible.

A contrary position is adopted by Roux, who argues that section 25 should only ever be relied on directly as a last resort and that reliance on the principle of legality in these scenarios would be preferable to direct reliance on section 25(1).¹³⁰ Referring to the example of executive action that effects a deprivation of property, Roux argues that the executive action in question would be reviewable both under section 25(1) and in terms of the principle of legality, but indicates that the preferred approach is to test the executive action as a possible violation of the principle of legality and not as an arbitrary deprivation of property under the property clause. Roux's example arguably illustrates the point that regulatory measures brought about by executive action could be dealt with differently than, for example, direct statutory deprivation or common law regulation, although it is not completely clear why legality would be preferred to section 25(1).

¹³⁰ Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa (CLOSA)* vol 3 (2nd ed RS 5 2013) 46-1 – 46-37 at 46-26.

Another indication that the assumption referred to above might not be correct, is the decision in *Aboobaker NO and Others v Serengeti Rise Body Corporate and Another*,¹³¹ which seems to support the idea that legality can apply alongside the provisions of PAJA.¹³² In this case, the principle of legality is not an independent cause of action, but rather a constitutional notion that supplements the review proceedings.¹³³ However, the High Court does not engage with the interaction between the principle of legality and the provision of PAJA in detail, but it will be interesting to see if this approach is adopted in subsequent cases.

Insofar as the principle of legality operates as a safety net to control exercises of public power (which fall outside of administrative action), it can be used as an independent ground of review. However, the framework of section 25(1) is more context-specific and should arguably be relied on where possible, instead of opting for the more general principle of legality. By adopting a uniform approach, the legal system is safeguarded from unjustified parallel development. However, indirect reliance on the principle of legality, as a normative notion to assist with the interpretation or application of law, is arguably still possible.

The principle of legality clearly has a role to play as a basis for judicial review of non-administrative actions.¹³⁴ However, insofar as it is seen or utilised as a way of circumventing the application of provisions of PAJA, it is a regrettable development, especially in light of the single-system-of-law principle. The effect of allowing the principle of legality to subsume PAJA's functions is to allow the creation of parallel routes to challenge administrative

¹³¹ [2015] ZAKZDHC 54 (29 June 2015)

¹³² *Aboobaker NO and Others v Serengeti Rise Body Corporate and Another* [2015] ZAKZDHC 54 (29 June 2015) para 8.

¹³³ *Aboobaker NO and Others v Serengeti Rise Body Corporate and Another* [2015] ZAKZDHC 54 (29 June 2015) paras 8, 26.

¹³⁴ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 418; Price A "The evolution of the rule of law" (2013) 130 *South African Law Journal* 649-661 657.

action.¹³⁵ It does not create parallel systems when legality is relied on to challenge executive action (as opposed to administrative action) because the action does not fall within the ambit of PAJA. However, if the executive action can be challenged on the basis of either section 25(1) of the Constitution or the principle of legality, section 25(1) as the more specific provision, should be used to protect the affected right. The necessary deference can be shown to the executive by employing a lower level of scrutiny of the action within the framework of section 25(1), instead of relying on the principle of legality.

In the following section, the notion of procedural fairness in terms of section 33 of the Constitution and sections 3 and 4 of PAJA is compared to the notion of procedural non-arbitrariness as understood in terms of the jurisprudence on section 25(1).

4 6 3 *Procedural fairness*

Section 33 of the Constitution guarantees the right to just administrative action that is, amongst other things, procedurally fair. Sections 3 and 4 of PAJA aim to give effect to this aspect of the right by setting out what is considered to be procedurally fair administrative action, whilst leaving scope for an administrator to consider contextual factors and depart from the suggested procedure. Procedural fairness is therefore essentially a flexible and contextual concept.¹³⁶

¹³⁵ See the criticism levelled against the approach of the Constitutional Court in *Albutt* by Murcott M “Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?” (2013) 130 *South African Law Journal* 260-274 268-270 as well as the argument put forth by Hoexter C “The principle of legality in South African administrative law” (2004) 4 *Macquarie Law Journal* 165-185 that continued conceptualism in the constitutional era is at least partly responsible for the judicial extension of and reliance on the principle of legality.

¹³⁶ This characteristic of procedural fairness has been reiterated in case law. See, for example, *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) paras 113-114.

Because of the inherent flexibility of procedural fairness, it has the potential to promote a rich conception of administrative justice. Quinot emphasises the importance of procedural fairness in various contexts where administrative law principles are applicable and argues that it has the potential to help realise socio-economic rights, if interpreted and developed correctly.¹³⁷ Procedural fairness has an important role to play in realising a variety of constitutional objectives and to improve administrative decision-making in general. Firstly, it has the potential to ensure that all relevant considerations are brought to the attention of the administrator before a decision is made.¹³⁸ This aspect of procedural fairness could be particularly significant in the property context, where considerations other than the rights of the property owner could influence the decision.¹³⁹ Secondly, having proper regard for the link between procedural fairness, especially participation, and the dignity of persons who stand to be affected by the decision can encourage the development of a rich conception of procedural fairness in the hope of realising the ideal of administrative justice and supporting other constitutional rights and values.¹⁴⁰

¹³⁷ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 26. Compare, for example, the generous approach in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) to the formalistic approach in *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC).

¹³⁸ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 27.

¹³⁹ Consider, for instance, the debate regarding the interpretation of certain provisions of the National Building Regulations and Building Standards Act 103 of 1977 in a series of cases to determine to what extent a neighbouring landowner’s interests must be taken into account by a local authority when approving building plans. See *Walele v City of Cape Town* 2008 (6) SA 129 (CC); *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA), *Camps Bay Ratepayers’ and Residents’ Association and Another v Harrison and Another* 2011 (4) SA 42 (CC); *Turnbull-Jackson v Hibiscus Court Municipality and Others* [2014] ZACC 24 (11 September 2014); *Aboobaker NO and Others v Serengeti Rise Body Corporate and Another* [2015] ZAKZDHC 54 (29 June 2015).

¹⁴⁰ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 27. Also see Nedelsky J “Reconceiving autonomy: Sources, thoughts and possibilities” (1989) 1 *Yale Journal of Law and Feminism* 7-36 27.

This argument carries significant weight in housing and eviction cases, since the Constitutional Court explicitly stated that “people in need of housing are not, and must not be regarded as a disempowered mass”.¹⁴¹ More generally, this argument is linked to ongoing debates in administrative justice jurisprudence regarding the intrinsic value of procedural fairness.¹⁴² Both these aspects of procedural fairness are closely linked to the development of meaningful engagement (as a requirement and as a remedy) which is discussed in more detail below.

A possible obstacle to a rich conception of procedural fairness is the terminology and requirements set out in PAJA, such as the requirement that administrative action must have an adverse as well as a direct, external legal effect, which could mean that preliminary decisions or investigations are excluded from PAJA’s scope. Essentially, this means that procedural fairness need only be observed during the final stage of decision making.¹⁴³ Despite this potentially limiting effect of PAJA, courts have on occasion recognised that even preliminary decisions may have severe consequences and that the procedural fairness provisions ought to be applicable to them.¹⁴⁴ Section 33 itself does not contain a similar limitation on the right to procedurally fair administrative action and that the argument may

¹⁴¹ *Occupiers of 51 Olivia Road Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 20.

¹⁴² The intrinsic value of participation and procedural fairness is addressed in more detail below.

¹⁴³ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 441.

¹⁴⁴ See for example *Oosthuizen’s Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 (2) SA 570 (T) para 25. However, see *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) para 37, where Mogoeng J (as he then was) stated that the decision to investigate and the process of investigation itself is not likely to adversely affect rights in a direct, external legal manner. See further the discussion by Quinot G “Administrative law” 2011 *Annual Survey of South African Law* 49-65 49 on *Roux v Health Professions Council of South Africa and Another* [2012] 1 All SA 49 (SCA) regarding the extension of the ambit of administrative action to include the formulation of a charge sheet (in disciplinary proceedings). Quinot questions whether this decision can be said to have adversely affected rights or have had a direct, external legal effect, as required by PAJA, especially if a final decision (to take disciplinary action or not) is taken only after the subsequent hearing.

thus be made that PAJA may be unconstitutional in introducing these limitations or may have to be read expansively to avoid such a restrictive finding (as the Court in *Joseph* has arguably done).¹⁴⁵

However, in the housing context (where preliminary inquiries could ultimately have extremely serious consequences for occupiers) this restriction is one factor that has arguably contributed to the development of an alternative mechanism outside of the framework of PAJA to ensure participation. Meaningful engagement is essentially a judicial creation intended to address the need for inclusive and participatory decision-making in the housing-context. It is the focus of the following section.

The interpretation and development of procedural fairness in administrative law is potentially relevant for the approach to similar concepts in other areas of the law. For instance, procedural fairness is not explicitly required by section 25(1) of the Constitution, but the reference to arbitrariness was judicially interpreted to include both a substantive and a procedural component.¹⁴⁶ This notion was accepted in subsequent case law and from these decisions it seems clear that procedural fairness in the context of section 25(1) corresponds closely (if not exactly) with what administrative law jurisprudence considers to constitute procedural fairness.¹⁴⁷ The emphasis on the flexibility of the concept and the importance of determining fairness in a particular context echoes the content of sections 3 and 4 of PAJA.¹⁴⁸

¹⁴⁵ *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) paras 25-29. Consider further the majority decision in *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 30 where the Court seem to almost invite a challenge to these limiting elements of PAJA.

¹⁴⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁴⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 65 merely states that the Constitutional Court has indicated “in contexts other than section 25(1)” that procedural fairness is a flexible concept that must be evaluated with reference to the circumstances

The procedural aspect of arbitrariness in terms of section 25(1) was addressed in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng*,¹⁴⁹ where the Constitutional Court held that procedural arbitrariness is a flexible concept that cannot be defined or interpreted without reference to the relevant circumstances. Van der Walt suggests that the *Mkontwana* decision can be seen as an indication that the procedural fairness of a deprivation will be evaluated on

of each case. *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 40 accepts the *Mkontwana* dictum. Also see Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 89; Iles K “Property” in Currie I & De Waal J (eds) *The bill of rights handbook* (6th ed 2013) 530-562 541.

¹⁴⁸ See *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 15, 40-47 where the Court considers the procedural fairness of the deprivation in question. The applicants referred to section 3 of PAJA as a baseline for the requirement of procedural fairness but the Court did not expressly engage with this argument, having decided that the publication of lists of roads and designs by the MEC did not constitute administrative action and that PAJA did not apply to the matter. The Court then refers to *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC) as further authority for its contextual approach and holds that, under the circumstances, the deprivation is not procedurally arbitrary. The Court finds that in the particular context, the initial consultations were adequate and it would not be practical or in the public interest to revisit the numerous designs published in terms of the authorising legislation since the consultations took place. Although this is a reasonable conclusion and the Court is correct in its finding that the requirements of procedural fairness will depend on the circumstances, it is interesting to note that the authority relied on (the *Masetlha* decision) dealt with procedural fairness requirements under the principle of legality. Moreover, the section of the *Masetlha* judgment that was quoted in *Reflect-All* as authority for its approach stemmed from the minority judgment in *Masetlha*, where Ngcobo J specifically dissented from the majority’s view that the principle of legality did not include a procedural fairness component. The quoted section is therefore probably *obiter*, although it still carries weight as an *obiter* statement by the Constitutional Court. The Court’s use of authority in *Reflect-All* shows that questions regarding the role, content and function of procedural fairness are closely related, despite originating in different fields of law, and that the overarching concern is that the notion of procedural fairness should be informed by constitutional norms and values.

¹⁴⁹ 2005 (1) SA 530 (CC) para 65, hereafter referred to as *Mkontwana*. This approach was also followed in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC). See Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 89-90.

a similar basis as the test for procedural fairness in the context of just administrative action.¹⁵⁰ *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*¹⁵¹ confirmed what was said in *Mkontwana* regarding the nature and content of the test for procedural arbitrariness.¹⁵²

In *National Credit Regulator v Opperman and Others*¹⁵³ and *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others*¹⁵⁴ the Constitutional Court further engaged with the notion of procedural arbitrariness and held that a statutory provision which leaves no discretion to the court to make an order under the section in question would be procedurally arbitrary.¹⁵⁵ Both *Opperman* and *Chevron* are examples of direct statutory deprivation, where there is no administrative action involved, and are therefore dealt with exclusively in the domain of section 25(1) of the Constitution.

Procedural arbitrariness in terms of section 25(1) seems to correspond closely to procedural fairness in the administrative law context, which means that procedural arbitrariness must be adjudicated according to administrative justice principles, but under section 25(1).¹⁵⁶ This shows how important it is to determine whether developments of

¹⁵⁰ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 89.

¹⁵¹ 2009 (6) SA 391 (CC).

¹⁵² *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 44-47. See Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 90.

¹⁵³ 2013 (2) SA 1 (CC).

¹⁵⁴ [2015] ZACC 15 (5 June 2015) paras 22-24.

¹⁵⁵ A lack of discretion when making an order to forfeit property was already identified as problematic for purposes of procedural arbitrariness in *Mohunram and Another v National Director of Public Prosecutions and Another* 2007 (4) SA 222 (CC) para 121. The dictum in *Mohunram* was cited with approval in *Opperman* and *Chevron*. See *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 69; *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15 (5 June 2015) para 22.

¹⁵⁶ Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stellenbosch Law Review* 88-94 90.

procedural fairness in administrative law will continue to influence the test for procedural arbitrariness in terms of section 25(1) and vice versa. The normative content of the right to procedural fairness could, for example, have been influenced or developed by the courts' rich conceptualisation of a type of procedural protection in the form of meaningful engagement in the housing context.

4 6 4 *Meaningful engagement*

Meaningful engagement is a fairly recent development in South African law that was introduced by courts in the housing and eviction context.¹⁵⁷ In this section the development of this concept is scrutinised to determine whether there is unjustifiable duplication between meaningful engagement and procedural fairness.¹⁵⁸

The conceptualisation of “meaningful engagement” was not uncontroversial, and uncertainties regarding its scope and application remain.¹⁵⁹ For example, meaningful engagement has been framed as a requirement for reasonable government policy in some cases but it has also been employed in the remedial phase of disputes, where courts ordered parties to engage meaningfully.¹⁶⁰ Interestingly, neither section 26 of the Constitution, nor the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)

¹⁵⁷ The idea underlying meaningful engagement was alluded to in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 87 and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 39.

¹⁵⁸ Muller G “Conceptualising ‘meaningful engagement’ as a deliberative democratic partnership” (2011) 22 *Stellenbosch Law Review* 742-758 745.

¹⁵⁹ Hepple B “Negotiating social change in the shadow of the law” (2012) 129 *South African Law Journal* 248-273 261.

¹⁶⁰ See *Occupiers of 51 Olivia Road Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 5; hereafter referred to as *Olivia Road*. Also see Van der Berg S “Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?” (2013) 29 *South African Journal on Human Rights* 376-398 376.

explicitly requires anything that resembles meaningful engagement and therefore neither of these instruments can easily be identified as the foundation for the development of this concept.¹⁶¹ In fact, the basis of meaningful engagement remains unclear. In *Occupiers of 51 Olivia Road Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*¹⁶² meaningful engagement was linked not only to administrative justice and the value of dignity, but it was also said to be grounded in section 26(2) of the Constitution.¹⁶³ In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*¹⁶⁴ O'Regan J based the duty to engage meaningfully on section 33 of the Constitution. Despite the lack of clarity about the basis of meaningful engagement, it seems to now form part of South African law, especially in the context of housing, although the concept has been used in other contexts as well.¹⁶⁵

Van der Berg argues that meaningful engagement should not be seen as a watering down or proceduralisation of socio-economic rights, but rather as a means of informing the content

¹⁶¹ Hepple B "Negotiating social change in the shadow of the law" (2012) 129 *South African Law Journal* 248-273 256.

¹⁶² 2008 (3) SA 208 (CC).

¹⁶³ *Occupiers of 51 Olivia Road Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) paras 16, 18, 20. According to section 26(2) of the Constitution the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. See the discussion by Van der Berg S "Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?" (2013) 29 *South African Journal on Human Rights* 376-398 384; Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 297.

¹⁶⁴ 2010 (3) SA 454 (CC).

¹⁶⁵ See *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC) paras 43-44, 51 where the possible application of meaningful engagement in contexts other than section 26 is discussed. Also see Van der Berg S "Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?" (2013) 29 *South African Journal on Human Rights* 376-398 393. Furthermore, *Mamba v Minister of Social Development* Case No 36573/08 (T) (unreported judgment of 12 August 2008) is an example of a case where meaningful engagement was applied outside of the housing context. This case dealt with the closure of refugee camps and parties were instructed to engage meaningfully with all interest-holders. See the discussion by Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 422 for further detail.

of procedural fairness with normative considerations.¹⁶⁶ Viewed in this way, meaningful engagement “represents an ideal platform on which the interaction between administrative justice and socio-economic rights can be further expanded”.¹⁶⁷

However, Quinot argues in favour of a rich conception of procedural fairness to best serve the ideal of administrative justice, which would make judicial creations like meaningful engagement largely redundant.¹⁶⁸ The *Joseph* decision, for example, is indicative of a willingness to develop a rich conception of procedural fairness,¹⁶⁹ but a decision such as *Mazibuko and Others v City of Johannesburg and Others*¹⁷⁰ creates the impression that courts might opt for a more formalistic approach, which effectively avoids developing or “fleshing out” what administrative justice requires of public action to be considered procedurally fair.¹⁷¹ The aims and objectives of meaningful engagement are no doubt laudable and yet the

¹⁶⁶ Van der Berg S “Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?” (2013) 29 *South African Journal on Human Rights* 376-398 377. Brand makes the argument regarding the proceduralisation of socio-economic rights in Brand D “The proceduralisation of South African socio-economic rights jurisprudence, or ‘what are socio-economic rights for?’” in Botha H, Van der Walt A & Van der Walt J (eds) *Rights and democracy in a transformative constitution* (2003) 33-56.

¹⁶⁷ Van der Berg S “Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?” (2013) 29 *South African Journal on Human Rights* 376-398 377, 392.

¹⁶⁸ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 26 argues that a rich conception of procedural fairness can and should resemble the judicial creation of meaningful engagement, insofar as it allegedly “goes further” than procedural fairness in the administrative law context.

¹⁶⁹ *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).

¹⁷⁰ 2010 (4) SA 1 (CC).

¹⁷¹ Quinot G “Substantive reasoning in administrative law adjudication” (2010) 3 *Constitutional Court Review* 111-139 134. Also see Van der Berg S “Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?” (2013) 29 *South African Journal on Human Rights* 376-398 390.

same objectives could arguably be reached through the application of procedural fairness, which now ought to be characterised by its contextual and flexible nature.¹⁷²

If the administrative law notion of procedural fairness is developed in the way suggested by Quinot, it is possible to argue that procedural non-arbitrariness, as understood in terms of section 25(1), ought to be developed in the same manner. As mentioned above, procedural non-arbitrariness is based on procedural fairness in administrative law and it therefore seems logical that procedural non-arbitrariness should reflect this development.¹⁷³ A counterargument for the extension of the procedural fairness provisions in PAJA often runs along the lines of being mindful of not over-burdening the administration, because doing so would arguably make the administration less efficient. This is a valid concern, but the flexible nature of procedural fairness and the provisions in PAJA that allow for a significant measure of variability lessen the possibility of paralysing the administration.¹⁷⁴

The Constitutional Court remarked that a regulatory approach which includes structured engagement before policy decisions are taken is preferable to a situation where engagement is mandated by the courts after the government has already committed to a policy.¹⁷⁵ If this is interpreted broadly, it could mean that the obligation to engage meaningfully is not only a

¹⁷² Van der Berg S “Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?” (2013) 29 *South African Journal on Human Rights* 376-398 382 explains that section 8(1)(c)(i) of PAJA allows a court to remit a matter to an administrator with or without directions – a remedy which could potentially be just as effective as a mandatory order to engage meaningfully and where a court retains supervision. Moreover, Van der Berg argues that it is artificial to ignore the commonalities between meaningful engagement and a progressive conception of procedural fairness; the overlap should rather be openly acknowledged and developed.

¹⁷³ Van der Berg S “Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?” (2013) 29 *South African Journal on Human Rights* 376-398 377, 392.

¹⁷⁴ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 404-405.

¹⁷⁵ *Occupiers of 51 Olivia Road Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 30. See Hepple B “Negotiating social change in the shadow of the law” (2012) 129 *South African Law Journal* 248-273 261.

duty before a final decision is taken (as would be the case in terms of PAJA), but can and should also be observed when preliminary decisions are made, if the impact of the preliminary decision is sufficiently serious.

Meaningful engagement could thus potentially be valuable to persons who do not presently qualify for procedural protection in terms of PAJA, presumably in cases where their interest does not amount to a right or legitimate expectation or because the offensive action is not administrative action.¹⁷⁶ Despite its possible value, it is not justifiable for courts to rely on meaningful engagement when PAJA is applicable to a matter, at the very least not without clearly and explicitly addressing the issue and explaining why meaningful engagement is preferred. Furthermore, one must consider what the effect of creating a distinct concept to facilitate participation is on further development of administrative law under the Constitution, which ideally ought to develop away from the formalistic notions of *audi alteram partem* under common law to a more transformative and facilitative concept of participation under section 33. Parallel developments pose the real risk of freezing existing law by insulating it against the transformative influence of the Constitution, in ways that are simply not justifiable and not logical. For instance, if meaningful engagement involves participation in a broader range of public action than would be the case under administrative law (for instance earlier in the process as well as after a decision has been taken), the question emerges why someone should have more participatory entitlements when public action is taken in a form other than administrative action than when the public action is taken in terms of administrative action. In other words, a person affected by public action amounting to executive action will have more opportunity for participation than in the case of public action

¹⁷⁶ However, if the innovative approach to “rights” in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) is followed there is less scope or need for the application of meaningful engagement. See Quinot G “Substantive reasoning in administrative law adjudication” (2010) 3 *Constitutional Court Review* 111-139 122.

amounting to administrative action. The exact opposite seems more appropriate from a democratic legitimacy point of view. Therefore, even though a specialised context might be present, it is not necessarily enough to justify parallel legal development, especially when it can have the effect of stultifying much-needed legal development in the potentially applicable area of law. Systemically, it is also difficult to explain how meaningful engagement can apply to cases where subsidiarity principles indicate that the matter should be resolved in terms of PAJA.

Meaningful engagement emphasises the important role that participation plays in the constitutional setting. The development of meaningful engagement (as a form of participation) is linked to the discussion regarding the intrinsic value of participation in establishing a fair procedure. Recently, this has become quite an important point in case law, especially in ongoing debates between the Supreme Court of Appeal and the Constitutional Court.¹⁷⁷ In the *Allpay* matter this debate emerges in the question whether action should be reviewed for procedural unfairness even though a fair procedure would have made no difference to the eventual (substantive) decision of the administrator, which is the view adopted by the Supreme Court of Appeal, relying on the concept of the materiality of the irregularity.¹⁷⁸ This approach is rejected by the Constitutional Court, partially based on the intrinsic value of procedural fairness.¹⁷⁹

¹⁷⁷ Consider, for instance, the opposing views of the two courts that are discussed in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) paras 23-27. Hereafter referred to as *Allpay*.

¹⁷⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others* 2013 (4) SA 557 (SCA).

¹⁷⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) paras 23-27. Also see *Aboobaker NO and Others v Serengeti Rise Body Corporate and Another* [2015] ZAKZDHC 54 (29 June 2015) paras 25, 32.

The notion of participation (and the related considerations of the intrinsic value of participation) is also of importance in the property context. For instance, Walsh offers an interesting perspective on what she refers to as “the relationship between property and participation” in her analysis of trends in English planning law.¹⁸⁰ Stated briefly, Walsh argues that a central aspect of modern-day English planning law is the statutory rules which give owners and interest-holders “a voice” in decision-making processes that affect their property. By guaranteeing some kind of role for affected parties, the decision-making process is not necessarily focused on either possessory value or exchange value. Through the prioritisation of “voice over value”, decision-makers are forced to consider possible competing claims to the entitlement and decide what regulatory measure would strike the appropriate balance between the private and the public interest.¹⁸¹ In the process, these participation rights become a source of potential protection for property rights as well as other property interests.¹⁸²

In South African law, property rights are no longer shaped only by the rules of the common law. Administrative law plays a significant role in determining how property may be used and is also central to ensuring that the property system reflects the proper balance between public and private interests in property, as envisioned by the Constitution. It is therefore interesting to consider Walsh’s argument, not only as an explanation for what seems factually to be the case, namely that property rights are extensively regulated by administrative action, but also to consider whether there are any benefits in opting to replace

¹⁸⁰ Walsh R “The evolving relationship between property and participation in English planning law” in Hopkins N (ed) *Modern studies in property law: Volume 7* (2013) 263-290 264.

¹⁸¹ Walsh R “The evolving relationship between property and participation in English planning law” in Hopkins N (ed) *Modern studies in property law: Volume 7* (2013) 263-290 281.

¹⁸² Walsh R “The evolving relationship between property and participation in English planning law” in Hopkins N (ed) *Modern studies in property law: Volume 7* (2013) 263-290 268. The term “participation rules” is a further development of the ideas introduced by Calabresi G & Melamed D “Property rules, liability rules, and inalienability: One view of the cathedral” (1972) 85 *Harvard Law Review* 1089-1128.

so-called “property rules”, “liability rules” or “inalienability rules” with “participation rules” in certain cases.¹⁸³ By prioritising the opportunity to be involved (in some way) in the decision-making process, instead of automatically focusing on either the protection of possession or value, parties who do not have a traditional property right or interest would receive the opportunity to be involved in some way in regulatory decisions affecting their interests, which might be of particular social importance, for instance in the housing context. Another rationale for participation rules can be inferred from Davidson’s argument that people can be motivated to engage with property when they know that even though the system can change, the legal system will be responsive and make provision for fair adjustment and inclusion.¹⁸⁴ Participation rules is one way through which inclusivity (and arguably also a measure of responsiveness and fairness) in the legal system can be ensured.

The notion of participation rules does not necessarily have to correspond exactly with the procedural fairness requirements that are set out in PAJA, nor should it be understood to refer only to direct participation (for example the right to be heard or to make written submissions). Instead, it can include any procedure where an interested party is allowed to make the decision-maker aware of his interest, even if the interest is not strictly a right or legitimate expectation, as would be required in terms of PAJA. Participation rules would

¹⁸³ Calabresi G & Melamed D “Property rules, liability rules, and inalienability: One view of the cathedral” (1972) 85 *Harvard Law Review* 1089-1128 1105-1115 argued that there are three categories of rules that protect property rights. The first category is property rules, which give a veto power to the entitlement holder. Under this protection the entitlement holder could not be deprived of her property unless she consents thereto. The second category is liability rules where no veto power exists, and the entitlement is subject to deprivation, but the entitlement-holder would be entitled to compensation. The third category is alienability rules which prevent transfer of the property, regardless of the consent or wishes of the entitlement-holder. See Walsh R “The evolving relationship between property and participation in English planning law” in Hopkins N (ed) *Modern studies in property law: Volume 7* (2013) 263-290 267 for a more detailed discussion of the further development of these rules to include participation rules.

¹⁸⁴ Davidson NM “Property’s morale” (2011) 110 *Michigan Law Review* 437-488 442-443 argues that both stability and dynamism are fundamentally important to foster confidence in a property system.

mainly be useful in situations where the property interest does not qualify as a right or legitimate interest that is protected by certain provisions in PAJA, or when the regulatory action is not administrative action. Participation rules, when used appropriately, could ensure that deprivations are not arbitrary and therefore not in conflict with section 25(1) of the Constitution.

In a sense, the idea of participation rules links with and reinforces the constitutional values of consultation and participatory democracy,¹⁸⁵ and it is therefore an intriguing notion to protect property through participation rules in the South African context.¹⁸⁶ It is a viable form of protection that already exists, for example in planning law,¹⁸⁷ and can be used in other contexts as well. It is a form of property protection that is in line with the constitutional emphasis on consultation and participation, and aligns with both the protective and the transformative objective of section 25(1).

Property rules and liability rules will always form part of the property system, but the development of participation rules can go some way in guarding against over-inflated or one-sided protection of property rights. Participation rules have much in common with, for example, meaningful engagement, but by linking it to the procedural non-arbitrariness

¹⁸⁵ Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 26; Hoexter C *Administrative law in South Africa* (2nd ed 2012) 249.

¹⁸⁶ The scope, purpose and effectiveness of participation in the administrative law context are controversial and discussed extensively in the literature. I do not enter into the technical aspects of its application in practice, because it would extend the scope of the dissertation. See Muller G *The impact of section 26 of the Constitution on the eviction of squatters in South Africa law* (2011) 257-282; Quinot G “Snapshot or participatory democracy? Political engagement as fundamental human right” (2009) 25 *South African Journal on Human Rights* 392-402 398; Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 26.

¹⁸⁷ Consider for example *Aboobaker NO and Others v Serengeti Rise Body Corporate and Another* [2015] ZAKZDHC 54 (29 June 2015). Also see Van Wyk J “Neighbours – their place and role in town and regional planning – a perspective from German law” 1996 *Tydskrif vir die Suid-Afrikaanse Reg* 279-301 282-286 for a discussion on the importance of participation in the planning law context.

requirement in section 25(1), it gives context to what procedural fairness means in the property context without creating a new way of facilitating participation.

Utilising or developing participation rules to give content to what procedural fairness or procedural non-arbitrariness means in the property context is not the same thing as creating a distinctly new concept to facilitate participation, such as meaningful engagement. In the case of participation rules there would be more certainty regarding its foundation, scope and application, and it could be developed in a more structured manner. It represents the same opportunity (as meaningful engagement) to go beyond the doctrinal heritage when it comes to the regulation of property, and engage with innovative ways to reconceptualise the way in which the law protects property. Moreover, it can facilitate a better understanding of the function of the regulation of the use of property in a constitutional legal system differently.

Ultimately, the role and value of participation in the property law context has potential for supporting a new regulatory framework for property that exhibits constitutionally desirable characteristics. It shows that administrative law principles that develop in non-overlap cases can influence the approach to the regulation of the use of property in subsequent overlap and non-overlap cases and align the regulatory systems on a normative level. This outcome is in line with the objectives of the systemic constitutional approach, namely that it contributes to the creation of a single system of law with sub-components that are interrelated and based on the same normative framework.

Thus far, this section sets out the close links between the principle of legality (with a possible procedural fairness component), procedural fairness in the administrative law context, procedural non-arbitrariness in terms of section 25(1) and meaningful engagement (as a requirement for just public action, or alternatively as a solution to a dispute in the remedial phase of proceedings). Without clear guidelines on the scope and application of each of these concepts, there is a very real risk of creating parallel paths of litigation, which

would be irreconcilable with the single-system-of-law principle. Furthermore, the discussion shows that where related developments in non-overlap cases are ignored there can be discrepancies in the way public action is scrutinised, which leads to uncertainty. The systemic constitutional approach shows how important it is to choose the appropriate regulatory framework. Moreover, it shows that constitutional notions such as legality, procedural fairness and meaningful engagement serve similar purposes (albeit in different contexts) and should be seen as interconnected mechanisms that promote similar constitutional values. In the following section a similar type of development is analysed with reference to substantive arbitrariness (required by section 25(1)) and reasonableness (required by section 33 and PAJA).

4 6 5 *Arbitrariness and reasonableness*

The constitutional protection of property is discussed in depth in Chapter 3. In this section, the test for substantive arbitrariness is revisited to highlight some of the commonalities with the test for reasonableness in administrative-law review.

Section 25(1) of the Constitution states that no law may permit *arbitrary* deprivation of property. Because the term “arbitrary” is not defined in the Constitution, the Constitutional Court had to give content to what “arbitrariness” would entail where the constitutional validity of a regulatory measure is challenged in terms of section 25(1). The reference to arbitrariness was interpreted to include both a substantive and a procedural element, but only the substantive component of arbitrariness is discussed in this section.¹⁸⁸

¹⁸⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

The *FNB* decision focused on the interpretation of section 25(1) and established that substantive non-arbitrariness should in certain cases require more than mere rationality.¹⁸⁹ *FNB* determined that substantive arbitrariness inquiries need not always involve exactly the same level of scrutiny.¹⁹⁰ The appropriate test is located on a continuum between thin rationality review and thick proportionality review.¹⁹¹ However, the point of departure is that a deprivation will be substantively arbitrary when the authorising law of general application does not provide sufficient reason for the deprivation.¹⁹² Ackermann J, who wrote the unanimous judgment, indicated that several factors will be considered to determine whether there is “sufficient reason” for a deprivation, so as to render it substantively non-arbitrary.¹⁹³ He listed several considerations for evaluating “sufficient reason”, which include the relationship between the means used and the ends sought to be achieved, the relationship between the aim(s) of the deprivation and the right holder affected by the deprivation, and the relationship between the purpose of the deprivation, the nature of the property and the extent

¹⁸⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

¹⁹⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100(g). Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 243.

¹⁹¹ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 244. Van der Walt explains that the thick proportionality-type review endorsed in *FNB* falls short of the “full blown” proportionality test of section 36(1) of the Constitution. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 97-99 where the Constitutional Court rejected the argument that arbitrariness is the same as rationality.

¹⁹² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 245. See also for example *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 39.

¹⁹³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. The factors are set out and discussed in Chapter 3.

of the deprivation.¹⁹⁴ The reason for the deprivation will be tested with reference to a variety of contextual factors and these factors will be used to determine the appropriate standard of review.¹⁹⁵

A similar approach to assess the reasonableness of administrative action was adopted in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,¹⁹⁶ where the Court provided a list of factors to assist with the determination of the appropriate standard of review on a continuum that ranges from rationality to proportionality.¹⁹⁷

However, reasonableness review was not always understood in this way. In the administrative law context, where much emphasis is placed on judicial review, the question of the reasonableness or unreasonableness of a decision can require a consideration of the merits of the administrator's decision, a substantive question which is traditionally not dealt with as part of the review process.¹⁹⁸ Therefore, reasonableness has been one of the most challenging requirements for just administrative action as set out in section 33, and the content of reasonableness is not objectively clear or uncontroversial.¹⁹⁹ Hoexter states that

¹⁹⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. Also see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 245.

¹⁹⁵ Van der Walt AJ *Constitutional property law* (3rd ed 2011) 246.

¹⁹⁶ 2004 (4) SA 490 (CC).

¹⁹⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45.

¹⁹⁸ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 327; Quinot G & Liebenberg S "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 *Stellenbosch Law Review* 639-663 642.

¹⁹⁹ The common law relied on the categorisation or classification of administrative functions to determine the appropriate "type" of reasonableness review, but this solution was heavily criticised for its artificial classification of public functions. Baxter, for example, advocated for a unified ground of reasonableness in the pre-constitutional context by arguing that the appropriate balance will be struck if judges succeeded in grasping the difference between substantive and procedural ("dialectical") reasonableness. See Baxter L *Administrative law* (1984) 490-494. Also see Hoexter C *Administrative law in South Africa* (2nd ed 2012) 336.

reasonableness does not have one single (and uncontested) meaning and argues that at most one can safely say that the first element of reasonableness is rationality.²⁰⁰

Section 6(2)(f)(ii) of PAJA provides guidance by stating that an action is reviewable by a court or tribunal if it is not rationally connected to either of the following elements: the purpose for which it was taken; the purpose of the authorising legislation; the information placed before the decision-maker; or the reasons given by the administrator. This formulation is broad enough to constitute a “thorough and searching ground of review”.²⁰¹ However, despite the broad formulation of reasonableness in PAJA, Hoexter argues that it covers the same ground as many common law grounds of review and is therefore not particularly novel or controversial.²⁰² Moreover, in terms of the provisions of PAJA, rationality and reasonableness cannot be equated with one another because PAJA lists them as two separate grounds of review.²⁰³ Furthermore, reasonableness under section 33 means something different from justifiability under section 24 of the Interim Constitution (which meant only rationality) and thus reasonableness refers to something more than mere rationality.²⁰⁴ This provides further support for the argument that reasonableness must extend beyond rationality in the constitutional context and although the content of reasonableness is still somewhat controversial, it includes a second element, namely proportionality.²⁰⁵ Proportionality

²⁰⁰ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 340. Rationality in this context is understood to mean that a decision must be supported by the facts before the administrator, and it must be objectively capable of achieving the purpose for which the authority was given to the administrator.

²⁰¹ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 342.

²⁰² Hoexter C *Administrative law in South Africa* (2nd ed 2012) 342.

²⁰³ Section 6(2)(f)(ii) and section 6(2)(h).

²⁰⁴ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 108.

²⁰⁵ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 343-344. Also see Steinberg C “Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence” (2006) 123 *South African Law Journal* 264-284.

requires an administrator to consider the effect of a decision, since an imbalance between the means and the ends would render the decision disproportionate.²⁰⁶

As was mentioned above, the interpretation of section 6(2)(h) of PAJA was considered in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*.²⁰⁷ The Constitutional Court held that what is considered a reasonable decision will depend on the facts and circumstances of each case, although there are certain factors that are relevant to assess the reasonableness of the decision. These factors include:

“[T]he nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.”²⁰⁸

The list of factors is a useful aid to understand and interpret the reasonableness requirement and,²⁰⁹ most importantly, the factors confirmed the “inherent variability of reasonableness”.²¹⁰ The level of scrutiny to assess the reasonableness of a decision is thus located on a continuum, ranging from rationality-type review to a proportionality-like

²⁰⁶ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 344-345. Proportionality requires an administrator to consider whether less drastic or invasive measures are available to achieve the same outcome, to avoid an undue burden on the affected party. The concept of proportionality derives from German law.

²⁰⁷ 2004 (4) SA 490 (CC) para 44.

²⁰⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45.

²⁰⁹ A further indication of the systemic connectedness of constitutional notions is Du Plessis and Scott’s argument that the list of factors set out in *Bato Star* may prove to be useful to determine the appropriate standard of scrutiny under the principle of legality as well. See Du Plessis M & Scott S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” (2013) 130 *South African Law Journal* 597-620 620.

²¹⁰ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 349.

inquiry.²¹¹ The element of proportionality is introduced and supported by the last two factors, namely that competing interests and the impact of the decision must be considered.²¹²

The idea of a variable standard of review seems to be in line with recent developments in English administrative law, but also echoes the approach followed in *FNB*, where the Constitutional Court had to interpret the term “arbitrariness” in section 25(1) of the Constitution.²¹³ However, in *Bato Star* the Constitutional Court does not refer to its previous decision in *FNB* where a variable standard of review for arbitrariness was introduced.²¹⁴ This is not necessarily problematic when the different contexts of the cases are considered, but it is interesting to note that the approach to reasonableness review under PAJA and the test for substantive arbitrariness in terms of section 25(1) are similar, despite the fact that the initial formulation and the subsequent development of each are kept separate in case law.

Quinot and Liebenberg explore the idea that developments regarding reasonableness review in administrative law and socio-economic rights are connected to some extent in both overlap and non-overlap cases. They argue that a relationship exists between the development

²¹¹ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 349-350.

²¹² This approach to “contextual reasonableness” has a substantive nature. See Hoexter C *Administrative law in South Africa* (2nd ed 2012) 349; Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 646.

²¹³ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 349-350. However, variability forms part of South African law in other contexts as well. See Du Plessis M & Scott S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” (2013) 130 *South African Law Journal* 597-620 597. Du Plessis and Scott argue that although variability may be a desirable characteristic of law, it also creates uncertainty, especially where variability is ascribed to without clear guidance on the scope and application of a variable standard.

²¹⁴ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 349. It must be noted that the term “review” is often used in the literature when the level of scrutiny for arbitrariness in terms of section 25(1) is discussed, but it is not judicial review in the administrative law sense and therefore it is not controversial that substantive considerations feature quite heavily in the test to determine the appropriate level of scrutiny. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 238-240.

of reasonableness in the administrative law context and in the socio-economic rights context but that the development of reasonableness in each area has been kept separate.²¹⁵ However, there are two characteristics of reasonableness that are the same in administrative law and in socio-economic rights.²¹⁶ The one common denominator is the acknowledgement that more than one route is available to the state that would pass the standard of reasonableness.²¹⁷ The second common denominator is that in both contexts reasonableness is understood as a contextual enquiry, meaning that not only the standard of review will differ depending on the circumstances, but even the factors taken into consideration to determine that standard will vary from case to case.²¹⁸

The Constitution, especially the rights in the Bill of Rights, is of particular relevance and should influence the normative context of reasonableness review.²¹⁹ This means that when administrative action impacts on property, section 25 ought to influence the normative context of contextual reasonableness in administrative law. This approach would ensure that

²¹⁵ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 639.

²¹⁶ Steinberg C “Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence” (2006) 123 *South African Law Journal* 264-284 277.

²¹⁷ Steinberg C “Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence” (2006) 123 *South African Law Journal* 264-284 277 explains that this means that “appropriate leeway” is given to the public entity, thereby acknowledging that it is not up to the courts to decide what the “best” way is. Hoexter C *Administrative law in South Africa* (2nd ed 2012) 347 argues that reasonableness ensures an area of “legitimate diversity” in terms of which more than one possible reasonable choice is possible. See further Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 645-646.

²¹⁸ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 645-646. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) para 45; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) para 44. See also Steinberg C “Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence” (2006) 123 *South African Law Journal* 264-284 277-278.

²¹⁹ Quinot G & Liebenberg S “Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa” (2011) 22 *Stellenbosch Law Review* 639-663 647.

the same substantive considerations are considered on review that would be considered if the case was decided under section 25, not to pronounce on the correctness of the administrator's decision, but to assess whether the decision falls within a "band" of reasonable decisions on the merits.²²⁰

Accepting that a close link exists (in some areas) between the regulation of property and the right to just administrative action, it may be useful to keep the similarities between these two tests in mind. The link between these two fields of law exists on two levels, namely in areas of actual overlap (where administrative action has an impact on property) and secondly, on a normative level in both overlap and non-overlap cases. Normatively, the purpose and role of these two tests serve a very similar function, namely to constrain public power. The content of these two tests, especially where the subject matter is the same, should be in line with the constitutional framework and produce results which exhibit constitutionally desirable characteristics to enable efficient state regulation.²²¹

4 6 6 *The role of legality reconsidered*

In this section, I explore the possibility whether the principle of legality is a "systemic device" to align developments across diverse fields of law to achieve a degree of coherence within the constitutional legal system. Ensuring at least some level of coherence, especially in non-overlap cases, but also in overlap cases where the overlap is not explicitly recognised, is important for systemic legal development.

²²⁰ Quinot G & Liebenberg S "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 *Stellenbosch Law Review* 639-663 646-648, 661 show that the normative context is fundamentally important to define the band of reasonable options.

²²¹ Quinot G & Liebenberg S "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 *Stellenbosch Law Review* 639-663.

Because of the scope of this question, I primarily focus on the role that the principle of legality can play within the area of this dissertation, namely in the context of the regulation of the use property. The role and function of the principle of legality in the context of section 25(1) of the Constitution still need to be worked out in more detail, especially with reference to the “law of general application requirement” and the general neglect of the authorisation question in section 25 cases. Despite the narrow focus here, I recognise the value of determining the principle of legality’s importance on a wider normative level. What follows are brief remarks regarding the reconciliation between legality’s normative function and the trend in case law to use it as an independent cause of action.²²²

As was explained above, the principle of legality fulfils two different functions in South African law. Firstly, it functions as a type of “safety net” to exercise a measure of control over conduct that is not administrative action.²²³ Secondly, legality fulfils a normative purpose, namely to inform the interpretation and application of other provisions. In this section, this second function of legality is considered more closely.

Constitutional notions of reasonableness, arbitrariness and procedural fairness signal commitment to a certain type of society, based on the rule of law. The principle of legality arguably presents the opportunity to align these concepts on a higher normative level. The principle of legality potentially provides the mechanism for allowing other fields of law to influence the normative content and context in non-overlap cases, instead of functioning as an independent cause of action.

²²² Refer to section 4.6.2 above.

²²³ Du Plessis M & Scott S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” (2013) 130 *South African Law Journal* 597-620 598 argue that the safety net created by the principle of legality should cover situations where there is neither administrative action nor an infringement of a right in the Bill of Rights. This seems like a sensible position in terms of subsidiarity, although legality is used more widely at present.

There is a need for conceptual alignment between these constitutional notions, as well as a need for greater clarity on how these notions ought to be understood, interpreted, developed and applied with reference to each other and to higher level constitutional commitments. Insofar as the courts have shown a degree of willingness to engage with the principle of legality, it seems a viable mechanism for aligning further development and to create greater coherency, if approached not as a same-level alternative to reliance on other grounds, but as a higher-level linking device.

Clearer development and direction on the application of the principle of legality would lead to two improvements in this area of the law: firstly, there would be a higher degree of certainty.²²⁴ Secondly, clearer guidelines for legality jurisprudence could then be scrutinised by lawyers, academics and courts, to ensure a well-reasoned and principled approach to the development of the application of the principle of legality and the variable standard of review that goes with it.²²⁵

Undeniably there are also problems with this view of the principle of legality, and the objectives of achieving and maintaining higher level constitutional commitments could possibly be reached through reliance on other constitutional norms as well. Ultimately, the tentative suggestions put forth in this chapter can only amount to first steps in a much larger debate.

²²⁴ Du Plessis M & Scott S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” (2013) 130 *South African Law Journal* 597-620 615.

²²⁵ Du Plessis M & Scott S “The variable standard of rationality review: Suggestions for improved legality jurisprudence” (2013) 130 *South African Law Journal* 597-620 598, 615.

47 Conclusion

The analysis in this chapter makes it possible to draw two primary conclusions in relation to overlap and non-overlap cases. Firstly, since administrative law always functions with another area of law and the interaction between the two areas of law is usually unproblematic, the point of departure is that overlap cases do not present major difficulties. However, case law shows that the overlap is not always readily identifiable, and that litigants may want to frame their case in such a way that it is adjudicated as a non-overlap case so as to give them a choice between two causes of action.²²⁶ In a constitutional legal system, litigants should not be allowed to side-step applicable national legislation. Allowing litigants the unrestricted freedom to vindicate their rights in the way that suits them best can result in outcomes that are unstructured, unprincipled and inconsistent, with judgments that are difficult to make sense of doctrinally.

Through an extension of the subsidiarity principles, together with the single-system-of-law principle, I argue that when the use of property is regulated through administrative action, the provisions of PAJA form the applicable framework to fulfil the secondary regulatory function. However, both sections 25 and 33 still have important roles to play where property is regulated through administrative action, not only to ensure adequate protection of the allegedly infringed right, but also to ensure that the appropriate balance between the individual interest and the public interest is struck. The principles of administrative law should not be applied to property disputes in a way that disrupts the balance that section 25 aims to create, even if the dispute is adjudicated outside the realm of direct application of section 25, and therefore section 25 can inform the normative content of, for example, reasonableness review under PAJA.

²²⁶ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 66.

Secondly, non-overlap cases for purposes of this dissertation are described as either constitutional property law or administrative law cases, where the cause of action is founded on either section 25(1) or (2), or the provisions of PAJA. However, the analysis in this chapter shows that administrative law principles are sometimes used in property cases where there is no administrative action present, which means that administrative justice principles have an impact beyond direct application. This is most notable in cases dealing with procedural non-arbitrariness and the principle of legality. This conclusion underscores the importance of aligning constitutional notions that fulfil similar functions in different contexts.

This chapter aims to show that there are connections and relationships between seemingly isolated constitutional notions. The development of many of the identified notions is rife with problems, for a variety of reasons. Case law on these issues shows that judicial creation or extension of mechanisms and principles is not always desirable, even when it leads to a fair and presumably correct outcome in one specific case.²²⁷ The most important point of criticism is the uncertainty that follows such a creation or extension. It becomes more difficult for litigants to predict potential outcomes, and it adversely impacts on effective and efficient administration, because it would not be prospectively clear to an administrator what is expected. Moreover, the scope of application is uncertain. This can lead to parallel legal development, which is at odds with the single-system-of-law principle.

Judicial development of constitutional notions such as meaningful engagement is arguably a consequence of an overly formalistic approach to legal interpretation or failure to recognise that an already existing mechanism exists to fulfil the same purpose, which leads to parallel legal developments. Section 33 of the Constitution moved away from the conceptualism of

²²⁷ Consider for example the uncertainty that exists after *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 (4) SA 262 (CC) and *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) and the Court's apparent new construct for enforcing public promises, *vis-à-vis* the existence of the doctrine of legitimate expectation.

administrative common law as well as the conceptualism that was evident in section 24 of the Interim Constitution.²²⁸ However, certain provisions of PAJA, and especially the definition of “administrative action” in section 1, reintroduce the conceptualism that section 33 tried to avoid.²²⁹ Hoexter argues that this “judicial misdirection” places the courts’ focus on whether or not a decision is an administrative action, to the detriment of more substantive considerations that should be engaged with as well as a move away from what ought to be the central question, namely what the requirements for administrative justice in a particular dispute are.²³⁰ A new paradigm for administrative law, beyond what was envisioned in terms of the common law and the interim Constitution, can impact on efficient public administration in various ways besides the courts’ approach to dispute resolution.

The focus on conceptual questions, for example whether an action constitutes administrative action, arguably reintroduces formalistic legal reasoning into disputes and is arguably out of step with the constitutional commitment to a culture of justification.²³¹ Overly-technical judicial reasoning can have an inhibiting effect when it comes to developing administrative law, and can even go so far as to encourage courts to develop completely new

²²⁸ Interim Constitution of the Republic of South Africa 200 of 1993. See the discussion by Hoexter C *Administrative law in South Africa* (2nd ed 2012) 249.

²²⁹ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 249; Hoexter C “Judicial policy revisited: Transformative adjudication in administrative law” (2008) 24 *South African Journal on Human Rights* 281-299 288; Hoexter C “The principle of legality in South African administrative law” (2004) 4 *Macquarie Law Journal* 165-185 177; Henrico R “Re-visiting the rule of law and the principle of legality: Judicial nuisance or licence?” 2014 *Tydskrif vir die Suid-Afrikaanse Reg* 742-759 753.

²³⁰ Hoexter C *Administrative law in South Africa* (2nd ed 2012) 249; Hoexter C “The principle of legality in South African administrative law” (2004) 4 *Macquarie Law Journal* 165-185 185. See also Quinot G “An administrative law perspective on ‘bad building’ evictions in the Johannesburg inner city” (2007) 8 *ESR Review* 25-28 26. However, compare the argument in favour of conceptual reasoning in the English administrative law context by Forsyth C “Showing the fly the way out of the flybottle: The value of formalism and conceptual reasoning in administrative law” (2007) 66 *Cambridge Law Journal* 325-347.

²³¹ Hoexter C “Judicial policy revisited: Transformative adjudication in administrative law” (2008) 24 *South African Journal on Human Rights* 281-299 288.

mechanisms, such as meaningful engagement or by expanding the content of the principle of legality to achieve transformative objectives, instead of relying on or developing existing mechanisms.

A further conclusion that this chapter draws is that the language used in PAJA illustrates the importance of alignment between two fields as closely connected as that of property and administrative law. In the hope of creating a much desired constructive alliance between property and the right to just administrative action, and for administrative law to play a facilitative role in the new framework for the regulation of property, the provisions of PAJA must be interpreted in line with constitutional goals and objectives. This means that the provisions of PAJA are not neutral or separate from the subject matter which it regulates, since it is clear that the language and concepts used can have a significant impact on outcomes. However, the question of when regulation constitutes deprivation or a “material and adverse effect” is less problematic in the constitutional context than expected, because the systemic constitutional approach accounts for the effects of regulation of the use of property in the system. The fact that the regulation of the use of property is itself subject to regulation through statutory or constitutional measures, shifts the focus away from the nature of the limitation toward its effect, which can always be subject to constitutional scrutiny.

Furthermore, this chapter finds that the role and application of the principle of legality in the constitutional property law sphere is largely undeveloped and unanalysed. Roux is of the opinion that section 25 should be relied on only as last resort, with legality taking a more prominent role, but the comment is made in passing and not well-substantiated.²³² As was

²³² Although not precisely Roux’s point, the Constitutional Court recently had the opportunity to consider whether a matter should be adjudicated with reference to either section 25(1) of the Constitution or based on rationality (which is based on the principle of legality). The majority of the Court held that a liquor license constituted property for constitutional purposes and a challenge to legislation which regulates the use of the property must be dealt with in terms of section 25(1). Moseneke DCJ wrote a separate (but ultimately

mentioned above, it is difficult to conceive what advantages there might be to rely on the principle of legality instead of section 25(1), since section 25(1) is specifically developed to resolve property disputes and sets out more requirements for a valid deprivation than the principle of legality, which is not a context specific ground of review. If the principle of legality forms the basis of review of a regulatory measure in future, the courts should take care to indicate what its scope is *vis-à-vis* direct reliance on section 25(1).

The systemic constitutional approach is a useful way of approaching areas of overlap in a constitutional legal system. It shows that the design and structure of the system (and the interaction or relationship between sub-components) are of utmost importance for the system to function effectively, without unjustifiable parallel developments which leads to randomness in outcomes. In the following chapter, I consider the theoretical foundation of the systemic constitutional approach and discuss the systemic characteristics of the suggested approach in further detail.

concurring) judgment where he held that the interest in question does not have to (or should not) be protected as property for constitutional purposes, because there were other constitutional measures available, including rationality review and administrative justice principles. The approach of the majority to endorse a wide notion of property, and testing the validity of the regulatory measures in the framework of section 25(1) can arguably be seen as a preference for choosing direct reliance on a specific constitutional provision where possible, instead of opting for the more general framework of rationality review based on the principle of legality. See *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 33, 70, 94, 115, 124, 128-129.

Chapter 5

Theoretical perspectives on the systemic constitutional approach

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5 1 Introduction

In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa*¹ the single-system-of-law principle was expressly introduced into South African constitutional jurisprudence. The idea of one system of law has been influential in academic writing,² but its practical implications are still in the process of being worked out.³

A theoretical perspective offers deeper insight into the reasons why certain aspects of the regulation of the use of property are problematic and highlights the universality of many of these problems. I have selected key opposing theories, which make certain “systemic” claims in distinct (and seemingly incompatible) ways.⁴ The reason for my focus on theoretical perspectives with systemic elements is two-fold. Firstly, I want to show that an approach like absolutism which denies the complexity of the reality within which regulation occurs, is problematic. It views property as an individual right in terms of law which stands removed

¹ 2000 (2) SA 674 (CC) para 44.

² See for example Michelman FI “The rule of law, legality and the supremacy of the Constitution” in Woolman S & Bishop M *Constitutional law of South Africa (CLOSA)* vol 1 (2nd ed OS 2 2005) 11-1 – 11-44 11-35 – 11-36; Davis DM & Klare K “Transformative constitutionalism and the common and customary law” (2010) 26 *South African Journal on Human Rights* 403-509 430; Van der Walt AJ *Property and constitution* (2012) 19-20.

³ In the property context, a lot of this work has been done in Van der Walt AJ *Property and constitution* (2012) 19-91.

⁴ The two main theoretical perspectives that are analysed from a systemic point of view are some of Smith’s work, as a proponent of information theory, and some of the work of Singer, Van der Walt and Gerhart, as examples of alternatives to the utilitarian or information theory perspectives. Unlike Singer and Van der Walt, Gerhart does not belong to the progressive property group, but his theory has more in common with the work of progressive scholars, and aligns more with their stated objectives than with information theory. For a discussion of the classification of Smith’s work as forming part of information theory, and how this diverges from the work of progressive property scholars, see Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 924-929.

from the context in which it operates.⁵ The aim of this chapter is therefore to argue that property law in contemporary society is part of a complex system and that it is problematic to describe regulation as something that occurs outside of the system instead of within it. Secondly, this chapter offers an overview of systems theory and complexity theory, to analyse the systemic elements in several key property theories. By taking a closer look at the origins and development of systems theory and complexity theory, it soon becomes apparent that systems-terminology is not used uniformly and that there are several important differences between classic system theory and the systemic elements in recent property theory. I discuss these property theories (with systemic elements) to consider the theoretical underpinnings and implications of the systemic constitutional approach to the regulation of property. However, it is apparent from the discussion in section 5.5.5 below that property theories with systemic elements are not based on classic systems theory and are not a continuation of or new version of classic systems theory.

In earlier chapters, I consider the potential advantages of viewing property, and specifically the approach to the regulation of the use of property, as a system for organising social relationships in line with the Constitution.⁶ Within this view, the regulation (and protection against arbitrary regulation) of individual entitlements is but one aspect of the system, and regulation of the system aims to promote a variety of democratic values, such as liberty, dignity and participation, whilst trying to avoid an undue concentration of power.⁷ Greater awareness of the systemic effects of the regulation of property is a challenge to

⁵ See for instance the argument by Malan Y & Cilliers P “Deconstruction and the difference between law and justice” (2001) 12 *Stellenbosch Law Review* 439-449 446 that law can only become more attentive to difference by reconsidering the boundaries and categories that are established in different fields of law. Malan and Cilliers are of the opinion that this “reconsideration” cannot happen without an acknowledgement of the complexity of the social conditions in which law operates.

⁶ Singer JW *Entitlement: The paradoxes of property* (2000) 142.

⁷ Singer JW *Entitlement: The paradoxes of property* (2000) 141.

dominant mainstream ideas regarding the absolute freedom of owners to do as they wish with their property and the dominant view that property law is primarily concerned with individual entitlements.⁸ However, as this chapter shows, it is not enough to adopt a “systemic approach” to the regulation of property, since this has been done to some extent by both information theorists and progressive property theorists, to serve opposing ends. It is therefore important to consider what the foundations of the systemic constitutional approach are.

5 2 General systems theory and complexity theory

Systems theory is not predominately a legal theory, but less mainstream theoretical perspectives, such as systems or complexity theory, seem to offer scope for looking further than the stated doctrinal content of property.⁹ The previous chapters show how important it is to look for solutions to contemporary legal problems outside of the four corners of existing legal doctrine. Furthermore, because of the Constitutional Court’s indication in the *Pharmaceutical Manufacturers* case of the importance of viewing and developing the law as a single system, it seems useful to consider in more detail what has been developed in systems theory, in an attempt to better understand what a single system of law might look like. This section does not purport to give a comprehensive overview of systems theory or complexity theory, but instead highlights some aspects of what systems theory looks like in the legal context. Furthermore, it is important to note that the enthusiasm for classic systems

⁸ Singer JW *Entitlement: The paradoxes of property* (2000) 7-9; Van der Walt AJ *Property in the margins* (2009) 27-41; Van der Walt AJ *Property and constitution* (2012) 113-122.

⁹ Underkuffler LS “A theoretical approach: The lens of progressive property” 2013 *Property Law Review* 152-159 152; Van der Walt AJ *Property and constitution* (2012) 35; Van der Walt AJ “Tradition on trial: A critical analysis of the civil-law tradition in South African property law” (1995) *South African Journal on Human Rights* 169-206 203-205.

theory (along with complexity theory and chaos theory) has abated to some extent. Most importantly, an overview of the classic theories shows that the theoretical approach that this dissertation proposes is not based on classic systems theory, although some of the terminology remains influential.

Systems theory is a term used to describe “a loosely related family of approaches”, and is broadly understood as the interdisciplinary study of systems in general, with the goal of elucidating principles that can be applied to all types of systems at all nesting levels and in all fields of research.¹⁰ General systems theory has been described as “a discipline that develops, tests, and demonstrates laws that apply equally to a variety of fields” and there were high hopes for the adaption of the theory to a variety of other disciplines.¹¹

Complexity theory is closely related to systems theory that originated in mathematics and as the name implies, it consists of the study of complex systems.¹² The distinction between the notions “complex” and “complicated” is central to complexity theory. A system is complicated if it can fully be described in terms of its constituent parts. A system is complex if it cannot be completely understood by merely analysing its components. The interaction between the components is not fixed and can lead to novel features, called “emergent properties”.¹³ Law, as a nested system, has a complex nature, the system being more than the

¹⁰ Von Bertalanffy L *General system theory. Foundations, development, applications* (1968) 88; Lilienfeld R *The rise of systems theory – An ideological analysis* (1978) 25; Vermeule A *The system of the constitution* (2011) 8.

¹¹ Lilienfeld R *The rise of systems theory – An ideological analysis* (1978) 25.

¹² Ruhl JB “Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state” (1996) 45 *Duke Law Journal* 849-928 851-865; Hornstein DT “Complexity theory, adaption, and administrative law” (2005) 54 *Duke Law Journal* 913-960 917-918; Luhmann N *Law as a social system* (2004; transl Ziegert KA) 6, 98-104.

¹³ Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) iii-iv, 2-5.

sum of its parts.¹⁴ It seems necessary to consider certain aspects that traditionally form part of complexity theory, if only to recognise how difficult it is to assess the impact of parallel judicial creations on a complex system such as the legal system.¹⁵

Ruhl develops systems theory specifically in the administrative law context, and his approach offers valuable insights into the application of general systems theory (understood to include components of complexity theory) in the legal context.¹⁶ Ruhl offers various arguments in support of complexity theory as a paradigm for law and society as a dynamical system.¹⁷ What might make the application of Ruhl's approach troublesome is his insistence that one should work on developments in the sphere of the common law, because it is the area of law most responsive to changed circumstances, and therefore enhances the adaptability of the system.¹⁸ Ruhl argues that because changes to the dynamics at lower system levels affect

¹⁴ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 854-856, 916 characterises the interaction between law and society as a non-linear dynamical system and uses complexity theory as paradigm for reforming the "modern American law-and-society system".

¹⁵ In this regard, chaos theory also adds value to this perspective, but falls outside the ambit of this dissertation due to its highly specialised nature. Chaos theory studies the behaviour of dynamical systems that are highly sensitive to initial conditions – a response popularly referred to as the butterfly effect. The butterfly effect, simply put, describes the phenomenon that small differences in initial conditions yield widely diverging outcomes for dynamical systems, rendering long-term prediction generally impossible. See Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 875-893; Hornstein DT "Complexity theory, adaption, and administrative law" (2005) 54 *Duke Law Journal* 913-960 924-928. For a contrary view regarding the importance of chaos theory to study complex systems, see Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) ix. According to Cilliers, sensitivity to initial conditions are not that important, because it is the robust nature of complex systems that allows them to function consistently under different circumstances, which makes them sustainable.

¹⁶ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928.

¹⁷ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928.

¹⁸ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 919-920.

emergent properties which manifest at higher system levels, systemic changes should be introduced at lower system levels.¹⁹ In light of the views adopted in this dissertation regarding the subsidiarity principles and the single-system-of-law principle as well as the need for a new paradigm for the regulation of property, it might not be the most appropriate direction of development for South African law to focus only on development of the common law. However, his call for greater innovation at the lower systemic level, instead of designing mechanisms to directly address high-level emergent properties, is useful and relevant to keep in mind in the South African context, especially if this is understood as referring not only to the common law, but to include legislative measures.²⁰ Understood in this manner, Ruhl's suggestion can be read in support of subsidiarity and the single-system-of-law principle.

Luhmann is popularly regarded as the father of systems theory in the social sciences and his ideas on law as a social system have been widely recognised.²¹ Luhmann developed a modern version of legal-systems theory and identified several characteristics of law as a social system.²² A significant contribution of Luhmann's work is his argument that systems theory explains how law determines its own boundaries.²³ "Unity" of law is the manifestation of a characteristic of the legal system, namely that it is an autopoietic (self-creating), self-distinguishing system.²⁴ Luhmann argues that the boundaries of law cannot be determined by ethics or economics, but are determined by law itself. Moreover, systems theory is uniquely

¹⁹ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 889.

²⁰ See the discussion on the importance of the single-system-of-law principle and the subsidiarity principles, as well as the discussion on the problematic nature of parallel developments and judicial creations in Chapter 4.

²¹ Despite Luhmann's influence, the property theories discussed below are not based on Luhmann's work.

²² Luhmann N *Law as a social system* (2004; transl Ziegert KA) 3, 79-82, 88-94.

²³ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 4, 95.

²⁴ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 6, 98-104. Also see Luhmann N "The unity of the legal system" in Teubner G (ed) *Autopoietic law: A new approach to law and society* (1988) 12-35.

able to deal with complexity, and can be used to integrate “poly-contextual contexts”.²⁵ Law, as an autopoietic and self-distinguishing system has adapted to societal developments regarding complexity by becoming more complex, but if left unchecked, it can undermine one of the core functions of law, namely to produce and protect expectations.²⁶

A particularly interesting aspect of Luhmann’s theory is that he argues that the content of the “programmes” (stabilising structures) of law is contingent.²⁷ Because law is self-observing, it is possible for law to identify patterns, determine what is connected and ultimately create normative programmes that reflect the system’s adaption to societal changes. The structures of law are therefore dynamic in nature, but because law is a highly complex system not all structures can be treated as subject to change at all times.²⁸ Instead, structures are regarded as stabilising structures *most of the time*, and only regarded as contingent or dynamic under certain circumstances. Stated differently, legal rules are assumed to be “fixed”, unless challenged; thereafter the dynamic nature of the rules (the structures in terms of Luhmann’s theory) makes it possible for them to adapt when necessary.²⁹

²⁵ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 5.

²⁶ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 5, 147-148. Also see Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) 110.

²⁷ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 10-11, 17, 196. The programmes or structures of the system can be equated with legal rules. Luhmann’s theory is premised on the legal system’s ability to “code”, for instance to code facts as legal/illegal, but with no value judgment connected thereto. The application of the code is regulated through the programmes (structures) developed by the legal system. Law’s self-observing ability in turn makes it possible to create normative programmes. Also see Malan Y & Cilliers P “Deconstruction and the difference between law and justice” (2001) 12 *Stellenbosch Law Review* 439-449 441.

²⁸ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 11, 231.

²⁹ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 231; Ruhl JB “Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state” (1996) 45 *Duke Law Journal* 849-928 887 explains that sustainability is of utmost important and includes qualities such as adaptability, stability and simplicity. The call for simplicity to ensure sustainability and adaptability in general systems theory is also taken up in information theory.

Another interesting feature of Luhmann's theory is his argument regarding the inherent nature of values. Values are not imposed on the system externally to stabilise its operations. Values exist internally, very much part of the system.³⁰ The same can be said for rules of the system: rules are not separate from the system; they are fundamentally part of the system.³¹ This is a crucial point also made and developed by Singer, Van der Walt and Gerhart: the rules (whether originating in common law or statute) are not outside the system, they are inherently part of it. The importance of this issue is discussed in more detail below.

Systems theory and complexity theory can be useful in two ways: firstly, descriptively it is useful to understand the dynamics of the law as a complex system and, secondly, analytically it could prove useful to identify how certain changes or developments ought to be approached.³² In terms of analysis and identifying what and how change should be introduced, dynamic systems theory shows that ultimately the focus should not be on confronting "high-level emergent complexities head-on".³³ The lesson is that it is not only the rules of the system that have an impact on outcomes, but also the structure of the entire system.³⁴ The non-linear nature of the legal system, coupled with the importance of emergent

³⁰ Luhmann N *Law as a social system* (2004; transl Ziegert KA) 12.

³¹ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 914.

³² Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 886-889. The normative value of systems and complexity theory, especially in terms of Ruhl's suggested paradigm, appears to be limited. Also see Hornstein DT "Complexity theory, adaption, and administrative law" (2005) 54 *Duke Law Journal* 913-960 917-919 for a discussion of the use of complexity theory as a "descriptive tool".

³³ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 889.

³⁴ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 889.

properties at the systemic level, makes it difficult to predict the outcome of amendments to the system which could lead to unintended and unforeseen consequences.³⁵

General systems theory is a useful way of understanding various factors that impact on the interaction between law and society, but it does not seem to assist one with the development of solutions. Ruhl explains that there is an observational side to dynamical nonlinear systems theory which can observe effects that “had previously not been capable of cogent theoretical description”,³⁶ without denying that even when basing future developments on this theory it would be extremely difficult to predict its success.³⁷

For purposes of this dissertation it is important that complex problems cannot be solved with simple or reductionist solutions, because analysis of the components falls short of what is needed to solve the problem. If a systemic problem is discussed purely through analysis of its basic constituents, “too much of the relational information gets lost in the process.”³⁸ This is problematic when one considers the approach to the regulation of property in private law doctrine, which is essentially reductionist in nature. The absolutist approach, and to some extent even the inherent limitations approach, denies the complexity of the legal system in which property rights and limitations exist. The Constitution calls for greater consideration of the constitutional matrix and contextual considerations, and a suitable approach should create space for courts and legislatures to do so.

³⁵ Hornstein DT “Complexity theory, adaption, and administrative law” (2005) 54 *Duke Law Journal* 913-960 922 refers to the example of requiring administrative agencies to use cost-benefit analysis, in an attempt to promote systemic efficiency, which in fact led to greater inefficiency as emergent property.

³⁶ Ruhl JB “Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state” (1996) 45 *Duke Law Journal* 849-928 856 footnote 7.

³⁷ Ruhl JB “Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state” (1996) 45 *Duke Law Journal* 849-928 893, 896-898.

³⁸ Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) 10.

Another important aspect that Cilliers points out is that it is the structure of a complex system that allows it to behave in certain ways. If the system is not properly structured, it can lead to random behaviour. This feature of complex systems holds true for the legal system as well and perhaps explains the creation of parallel developments. When the area of overlap between areas of law or sources of law is not properly worked out, there is too little structure (“too many degrees of freedom”), which can lead to inconsistency.³⁹ Therefore, the design of the structure of the system is of utmost importance. Van der Walt has written on the desirable characteristics for a constitutional property system, and his work on the development of subsidiarity principles is arguably an attempt to create a suitable structure for the system to function in a non-arbitrary way, although his work is not based on the design principles of general systems theory.⁴⁰

Ultimately, systems theory (understood broadly to also include elements of complexity theory) is a useful descriptive tool and offers interesting insights for legal theory, although it is a dense area of study and capable of various interpretations and applications. In the following section I consider the systemic elements in current property theory to determine what the theoretical underpinnings of a systemic approach to the regulation of the use of property are, since it is not based on general systems theory or complexity theory.

5 3 Systemic thinking in property theory

5 3 1 Introduction

In this section, I analyse how systemic thinking has influenced developments in property theory, specifically with reference to the regulation of the use of property. This is not a

³⁹ Cilliers P “Complexity, deconstruction and relativism” (2005) 22 *Theory, Culture & Society* 256-267 258.

⁴⁰ Van der Walt AJ *Property and constitution* (2012) 35-40.

comprehensive discussion of either information theory or progressive property theory, since the literature abounds with examples of in-depth engagement with these theories and it is not necessary to restate all that has been written on this matter.⁴¹ Instead, I consider the systemic elements of each theory, and compare it to general systems theory, in an attempt to better understand the extent to which systemic thinking has already influenced property theory, and to consider what the theoretical underpinnings of the systemic constitutional approach are.

There is a heated debate in property theory between what Baron describes as information theorists and progressive theorists. Baron refers to these two sides of the debate regarding the way in which property “organizes human behaviour and social life.”⁴² On Baron’s classification, information theorists treat property as a machine by which clear signals are sent to the world regarding their behaviour *vis-à-vis* the property of others. Conversely, progressive theorists view property as a conversation, where complicating factors to a property dispute are always present and in fact welcomed, to ensure that the social relationships produced by the property system are appropriate.⁴³

Interestingly, both proponents of the progressive property movement and the information theorists include systemic considerations in their work. This indicates that although a systemic approach to the regulation of property might promote unified development of the regulatory system, it is not enough to ensure that both the protective and the transformative objectives of section 25(1) are met. More work should be done to determine how the system functions, how it ought to be developed and to what end. In the next section, the role of systemic thinking in the work of information theorists such as Smith is considered.

⁴¹ See for example Rosser E “The ambition and transformative potential of progressive property” (2013) 101 *California Law Review* 107-171; Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726; Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968.

⁴² Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 917.

⁴³ Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 918-919.

Thereafter, the systemic elements in the recent works of Singer, Van der Walt and Gerhart are discussed as examples of the alternative systemic approach to the regulation of property.

Finally, a systemic perspective raises many questions, but normatively speaking it is particularly important to consider the merit of evaluating a constitutional order or property system in a piecemeal fashion.⁴⁴ This is a valid point of criticism to consider, but Baron is arguably correct in saying that one can accept that property operates as a system and yet examine the operation, subcomponents and principles of that system in a piecemeal fashion, by determining when the focus of the analysis is centred on outcomes in terms of the relationships that the system produces and when the analysis is focused on how the system produces these outcomes.⁴⁵ Furthermore, as Smith points out, it is important not to conflate or confuse “the ordinary level of analysis *within* a system with the metalevel of propositions *about* that system”.⁴⁶

5 3 2 *Systemic thinking and information theory*

What Jane Baron describes as information theory has two key “commitments”: firstly, property is a system and secondly, property is exceptional in the sense that it is different from contract or delict (tort) because of the *numerus clausus* principle.⁴⁷ According to Merrill and Smith, the *numerus clausus* principle shows that the content of property has remained

⁴⁴ Vermeule A *The system of the constitution* (2011) 6.

⁴⁵ Baron J “Rescuing the bundle-of-rights metaphor in property law” (2014) 82 *University of Cincinnati Law Review* 57-101 89.

⁴⁶ Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1692. (Emphasis in original.)

⁴⁷ Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 938-939. These two commitments are not unique to information theory, and are in fact shared by progressive property theorists, albeit to a lesser extent. Progressive theorists mainly focus on outcomes or ends, and this is one of the fundamental differences between information theory and progressive theory.

relatively stable and fixed, and the principle is seen “simply as a fact about the way in which the system of property rights operates”.⁴⁸ They are not, however, denying that the state has the power to redefine property rights; instead, they argue that regulatory innovation should primarily be addressed by the legislature, and not the courts.⁴⁹ Smith states that he is not necessarily in pursuit of different ends than progressive property scholars, even though their method or means of achieving the aims are different.⁵⁰ While the progressive theorists directly address, for example, the promotion of human flourishing, Smith addresses this end indirectly, so as to not undermine the property system’s unique potential for solving problems.⁵¹ In many ways, Smith’s approach is more in line with classic general systems theory and complexity theory, which might explain why Smith’s work differs from the alternative property theories discussed in section 5.3.3, despite the presence of systemic elements. I return to this point below.

Information theorists also see property as a social ordering system, which primarily exists to give clear guidance to “the world” about how to treat things owned by others.⁵² Information theorists view property as relationships with things, not relationships between

⁴⁸ Merrill TW & Smith HE “Optimal standardization in the law of property” The *numerus clausus* principle” (2000) 110 *Yale Law Journal* 1-70 29. Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1700-1701 observes that property is “a holistic system made up of interactive components, not a system in which anything can in principle relate to anything else”. Smith indicates that this characteristic of the property system makes is both modular and complex. Systems are complex when there are many interdependencies within the system, and modular when modifications to one module have more defined consequences than, for example, in an unconstrained system. Modularity is then a way of managing complexity. Also see Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 943.

⁴⁹ Merrill TW & Smith HE “Optimal standardization in the law of property” The *numerus clausus* principle” (2000) 110 *Yale Law Journal* 1-70 58.

⁵⁰ Smith HE “Response. Mind the gap: The indirect relation between ends and means in American property law” (2009) 94 *Cornell Law Review* 959-989 963-971.

⁵¹ Smith HE “Response. Mind the gap: The indirect relation between ends and means in American property law” (2009) 94 *Cornell Law Review* 959-989 963.

⁵² Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 918, 938.

people.⁵³ Smith argues that, within this view of property as “the law of things” and property as delineated “modules”, there is an internal or systemic logic, which has both descriptive and normative elements.⁵⁴

According to Smith, property is an information system and concepts are merely “shortcuts” that lower the cost of handling complex information.⁵⁵ Modern conceptualists are sceptical of the notion that legal doctrine can or should be amended because of its consequences.⁵⁶ Hence, Smith criticises later realism for its failure to adequately consider the importance of the “holistic emergence of property’s institutional features”.⁵⁷

An important systemic element of Smith’s work is his focus on the emergent properties of the property system.⁵⁸ He argues that failing to distinguish between the purpose of property and how it functions leads to the fallacy of division.⁵⁹ Although we might want property *as a system* (“in all its parts”) to reflect certain stated purposes, it does not follow that all the parts, each of the rules and concepts of the system, ought to reflect the purposes of the system as

⁵³ Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 937.

⁵⁴ Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1700. Compare with Singer JW “Property as the law of democracy” (2014) 63 *Duke Law Journal* 1287-1335 1293.

⁵⁵ Smith HE “Emergent property” in Penner J & Smith HE (eds) *Philosophical foundations of property law* (2013) 320-338 320.

⁵⁶ Smith HE “Emergent property” in Penner J & Smith HE (eds) *Philosophical foundations of property law* (2013) 320-338 322. This particular point is contested by especially Singer, insofar as Singer argues that property and the property system cannot and should not be separated from the systemic effects and social relationships it creates. See the discussion of Singer’s work below.

⁵⁷ Smith HE “Emergent property” in Penner J & Smith HE (eds) *Philosophical foundations of property law* (2013) 320-338 328; Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1725.

⁵⁸ Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1718-1720.

⁵⁹ Smith HE “Emergent property” in Penner J & Smith HE (eds) *Philosophical foundations of property law* (2013) 320-338 335.

well.⁶⁰ The characteristics or “desirable features” of a property system, according to Smith, include stability, promotion of investment, autonomy, efficiency and fairness.⁶¹ Smith explains that many of the features of the property system are emergent, and identify some of these emergent properties as efficiency, fairness, justice, and virtue promotion. This does not mean that each rule or sub-component of the property system has to exhibit all of these features. For example, the emergent property of stability can only be evaluated with reference to its systemic role – in other words, as an aspect of the system – and not in an individual fashion as a “detachable feature or lever to be dialled up or down”.⁶² Many aspects are only describable and measurable at the systemic level, and therefore it is crucial for property theory to take cognisance of the property system’s effects, which emerge holistically.⁶³

Information theorists want property to be “systemically simple” to best communicate clear signals to the world about how to behave in relation to others’ property.⁶⁴ According to Smith, property has the potential for simplicity, or ideally, “overall complexity through local simplicity”.⁶⁵ In this sense and insofar as information theorists argue that the property system can exhibit emergent properties on a systemic level, through the interdependencies of the sub-components, thereby creating a complex (but not necessarily complicated) system, they add

⁶⁰ Smith HE “Emergent property” in Penner J & Smith HE (eds) *Philosophical foundations of property law* (2013) 320-338 335 uses the classic example of water, with “wetness” as the emergent property of water insofar as water is wet without individual water molecules being wet. Property therefore may be just or efficient or serve human values without thereby requiring each component of the system to do the same by itself. Another apt example of the emergent property of a system is that of democracy – a state can be a democracy even though not every part of the system is democratic, for example the judicial branch of government.

⁶¹ Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1693.

⁶² Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1719.

⁶³ Smith HE “Property as the law of things” (2012) 125 *Harvard Law Review* 1691-1726 1698-1699.

⁶⁴ See Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 19.

⁶⁵ Smith HE “Emergent property” in Penner J & Smith HE (eds) *Philosophical foundations of property law* (2013) 320-338 334.

valuable insight to the discussion on the desirable characteristics of property law under the Constitution.

Smith's approach has many characteristics of a systems approach, as opposed to a systemic constitutional approach. He makes use of systems-theory terminology and ideas, mainly to support his argument that a conceptual, modular approach to property is the most efficient way to respond to the complexity of the system.⁶⁶ Smith explains that concepts (and certain other formal devices) suppress some context to manage complexity.⁶⁷ This is necessary, according to Smith, "because legal relations have their form based in part on people's cognitive limitations."⁶⁸ Central to Smith's argument is the economic function of concepts, arguing that it is an efficient way of keeping information costs low. While this may be true, the law and economics perspective of the consequences of conceptualisation is but one aspect of the problem. Smith does not deny this, but argues that awarding greater consideration to context increases complexity, which the law is not equipped to respond to. He addresses the reductionist nature of his theory by explaining that cognitive property theory allows for a combination of reductionism and holism. He reconciles these seemingly opposing positions by explaining that in cognitive theory, one can be reductionist in principle, whilst being holistic in practice. This is achieved by accepting or developing reductionist strategies (such as concepts and modularity) to deal with complexity, which will in its application promote holism.⁶⁹ Insofar as "holism" in Smith's view can be equated to the

⁶⁶ Smith HE "On the economy of concepts in property" (2012) 160 *University of Pennsylvania Law Review* 2097-2128 2099.

⁶⁷ These devices include for instance modularity, recursion, decontextualisation and the specific-over-general principle. See Smith HE "On the economy of concepts in property" (2012) 160 *University of Pennsylvania Law Review* 2097-2128 2107.

⁶⁸ Smith HE "On the economy of concepts in property" (2012) 160 *University of Pennsylvania Law Review* 2097-2128 2101.

⁶⁹ Smith HE "On the economy of concepts in property" (2012) 160 *University of Pennsylvania Law Review* 2097-2128 2127-2128.

systemic features of the alternative theories discussed below, it shows that Smith's systems approach does not look outside of the traditional conceptual framework, and therefore his approach is not an example of systemic thinking in property theory, as understood in the systemic constitutional approach.

5 3 3 Systemic features of other theoretical approaches

5 3 3 1 Background

In this section, I consider systemic aspects of the work done by Singer, Van der Walt and Gerhart. These three scholars work with different theoretical perspectives, but offer alternatives to the information theory approach discussed above. Similarities in their work pertain to systemic claims made to support vastly different outcomes than that of general systems theory and information theory. It therefore seems necessary to consider their work as alternative examples of systemic thinking.⁷⁰ None of the authors' works presents a continuation of general systems theory, Luhmann's work on law as a social system or complexity theory. Despite the references to systems theory terminology, it is a new approach to focus on the constitutional legal system in its totality.

What distinguishes Smith's work (as an example of information theory) and the academic works that I discuss below is that Smith's work is reductionist in nature, despite the systems and complexity language. He emphasises individual rights within the property system, while the works discussed below are essentially non-reductionist and acknowledge the complexity of the constitutional legal system into which property (the parameters for protection as well

⁷⁰ For the sake of convenience, I sometimes refer to the examples in this section as examples of progressive property theory, although strictly speaking only Singer and Van der Walt belong in this category. Gerhart is not a member of the progressive property movement, but his work is more in line with progressive property objectives than with that of information theory.

as limitations) fits in a specific way. Denying the complexity, or trying to manage it with reductionist strategies, distorts the role of property and the functional relationship that exists between property and regulation in the constitutional context.

5 3 3 2 A systemic democratic view of property

In Singer's notion of property in a democratic legal system, property for constitutional purposes is not regarded primarily as the embodiment of economic liberty. It is a constitutionally-framed right in a democratic constitutional legal system that serves a variety of important, political or constitutional objectives with strong systemic elements.⁷¹

According to Singer,⁷² property is a system "because it regulates relations among individuals in a manner that alters the nature of the social world".⁷³ Therefore, although property rights are viewed or conceptualised as individual entitlements, private property is a regime and a social construct, and the choice of property rules can have far-reaching systemic effects for society.⁷⁴ This means that these systemic effects have to be considered – but not only must they be considered; they must influence the meaning and scope of property rights.⁷⁵ Ultimately, Singer argues that regulation of the property system "is essential to create social relations that put ownership and human dignity within everyone's reach".⁷⁶

⁷¹ Singer JW "Should we call ahead? Property, democracy and the rule of law" (*publication forthcoming*) 6. Also see the discussion of Singer's "democratic model" of property by Walsh R *Private property rights in the Irish Constitution* (2011) 31-34.

⁷² As mentioned above, Singer is a progressive property scholar and is one of the original signatories to the statement of progressive property. See Alexander GS, Peñalver EM, Singer JW & Underkuffler LS "A statement of progressive property" (2009) 94 *Cornell Law Review* 743-744.

⁷³ Singer JW *Entitlement: The paradoxes of property* (2000) 152.

⁷⁴ Singer JW *Entitlement: The paradoxes of property* (2000) 152; JW Singer "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335 1296-1297.

⁷⁵ Singer JW *Entitlement: The paradoxes of property* (2000) 146.

⁷⁶ Singer JW *Entitlement: The paradoxes of property* (2000) 163. Also see Singer JW "Should we call ahead? Property, democracy and the rule of law" (*publication forthcoming*) 6.

Many existing property rules serve systemic objectives or promote systemic norms. Singer explains that this means that existing property rules serve other purposes than merely protecting individual entitlements. According to Singer, these types of rules, geared toward promoting “systemic norms”, exist (at least in part) to create a well-functioning property system.⁷⁷ For example, limiting the types of property rights is one example of a rule intended to promote systemic efficiency.⁷⁸ Not all rules are aimed at promoting efficiency, though Singer refers to landlord-tenant law as an example, where the rules create a context for other systemic values such as human flourishing and dignity.⁷⁹

Judged from a systemic perspective both Singer and Smith adopt some form of a systemic approach to property and acknowledge the importance of systemic norms or emergent properties of that system. However, Singer goes further and argues that it is possible and necessary to also view the property system as a “quasi-constitutional framework for social life”, to indicate the importance of viewing it as more than a mechanism of coordination or a way of managing complexity. Singer accepts (to some extent) property’s systemic, foundational and modular nature, but argues that when the focus of the system is coordination, valuable insights regarding property as part of a bigger constitutional problem are lost.⁸⁰ Ultimately, Smith’s normative objective for using systemic thinking is to focus on the systemic elements and structures necessary to “enable *any* legitimate values to be promoted”.⁸¹ Singer, on the other hand, employs systemic thinking to identify the values that

⁷⁷ Singer JW *Entitlement: The paradoxes of property* (2000) 147.

⁷⁸ Singer JW *Entitlement: The paradoxes of property* (2000) 147. The *numerus clausus* principle therefore plays the same efficiency-promoting role in Singer’s work than it does in Smith’s work, because Singer acknowledges the importance of efficiency as one of the systemic norms worth pursuing.

⁷⁹ Singer JW *Entitlement: The paradoxes of property* (2000) 147.

⁸⁰ Singer JW “Property as the law of democracy” (2014) 63 *Duke Law Journal* 1287-1335 1298-1299.

⁸¹ Singer JW “Property as the law of democracy” (2014) 63 *Duke Law Journal* 1287-1335 1300. (Emphasis in original.)

property should promote, instead of assuming them.⁸² Smith's system protects the system, while Singer's system protects the foundational values of a free and democratic society.

5 3 3 3 A modest systemic role for property

The second example of systemic thinking that I consider is put forth by Van der Walt in his recent article concerning the limited ("modest") systemic role that property plays in the legal system. Van der Walt develops a view of property's role under the South African constitutional system, to find the appropriate place and role for property law in the constitutional setting.⁸³ His theory is thus both descriptive and normative, showing that in case law non-property rights are often upheld to the detriment of property rights, and more importantly, that there are important systemic constitutional reasons for this to be so.⁸⁴

According to Van der Walt, the property system can be either simple or complex: it is simple insofar as a small number of clear rules regarding limited standardised property forms exist.⁸⁵ It is complex insofar as the application and interpretation of these rules are influenced by contextual and normative considerations.⁸⁶

⁸² Singer JW "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335 1301.

⁸³ Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15-106.

⁸⁴ See Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15-106 28-30 where he makes this argument with reference to case law that dealt with the right to life, dignity, equality, free movement and free speech or assembly, to illustrate the point that in certain cases property rights yield (and ought to yield) to other, non-property rights, because of the systemic importance of the non-property right.

⁸⁵ Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15-106 17-24 links up with the systemic-efficiency arguments of Smith and the importance of the *numerus clausus* principle in that context, but like Singer, Van der Walt acknowledges that there are other systemic norms of importance that necessitate the inclusion of further complicating factors.

⁸⁶ See Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15-106 22. Van der Walt relies on Baron's distinction to evaluate the simple or complex nature of the

Van der Walt argues that the importance of protecting property rights has been over-inflated in the past for a variety of reasons.⁸⁷ To combat the over-inflated notion of property as an individualistic right, the “modest systemic role in law” of protection of property should be recognised.⁸⁸ Although property rights are important, within the bigger picture (viewed systemically), the exceptions and qualifications to the protection of property are often more important because of the systemic purposes they serve.⁸⁹ He makes two important arguments in this context, firstly, that property need not be protected “as the guardian of every other right” and secondly, that where property and non-property rights are in conflict with one another, the appropriate methodology is not the balancing of the rights, but rather a demarcation exercise.⁹⁰ Stated differently, where a systemically important non-property right, such as life, dignity or equality is involved, the aim is to ascertain where the limits of property rights lie so as to secure the non-property right. This leads to the development of what Van der Walt calls “systemic limitations” on property rights, which is fundamentally different from the “proportionality-based justification of a limitation that is imposed on an

property system, and not necessarily on the technical meaning of these terms as developed in general systems and complexity theory. See Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968.

⁸⁷ These reasons include for example the perceived link between property and liberty and the idea that other fundamental rights can be protected through property (property as “the guardian of every other right”). See Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 26-27.

⁸⁸ Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 27; Van der Walt AJ *Property in the margins* (2009) 241-247.

⁸⁹ Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 27.

⁹⁰ Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 51.

otherwise restricted right”.⁹¹ A systemic limitation could be classified as “a limitation that is inherent to property”, although Van der Walt is hesitant to pronounce definitively on this point.⁹² From a systemic point of view, it seems desirable to treat certain disputes involving property rights and non-property rights as a demarcation issue instead of a balancing or justification exercise.⁹³ This point is also central to Gerhart’s property theory, which also exhibits strong systemic characteristics.

Ultimately, what makes the “modest systemic status of property” theory so attractive is its potential for challenging paradigmatic structures that continue to underlie property disputes, even in the constitutional context.⁹⁴ Van der Walt’s vision of the property system urges us to look beyond the existing doctrinal framework for solutions.⁹⁵ An appropriate role for property in the constitutional legal system will not result from tinkering with the definition of ownership or property (as the Dutch functionalists have done), but will result from the recognition that property slots into a much bigger system, and it must function within the framework of that system. This has to be the point of departure for property disputes, to adequately account for the systemic effects of property.

⁹¹ Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 51. Also see Chapter 3.4.2 where I discuss the relevance of the source of the limitation, and argue that in the case of direct constitutional limitation the direct application of section 25(1) is limited.

⁹² Van der Walt AJ “The modest systemic status of property” (2014) 1 *Journal of Law, Property, and Society* 15-106 62.

⁹³ A similar point was arguably made (albeit in a slight different context) by Moseneke DCJ in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 94, 115, 120 where he holds that there may be sound (constitutional) reasons for not protecting an interest as property for purposes of section 25(1) of the Constitution.

⁹⁴ Van der Walt AJ *Property in the margins* (2009) 29.

⁹⁵ Van der Walt AJ *Property in the margins* (2009) 247.

5 3 3 4 *A unified theory of property*

Gerhart's theory of property and social morality is the third example of systemic thinking in alternative theoretical approaches I consider.⁹⁶ I only discuss selected aspects of his theory, since, as the name implies, a grand unified theory of property is too broad in scope to discuss here. As with the previous scholars' work, I focus on the systemic elements in his work, especially insofar as it concerns the regulation of the use of property. Gerhart aims to develop a single theory to address and essentially overcome the dichotomies of property through what he calls a unified theory.⁹⁷ He argues that such a unified theory of property must justify the existence and the scope of rights, so that "rights and their limitations can be understood to emanate from a single set of values".⁹⁸ Values play an important role in Gerhart's work. His emphasis on understanding how the same values that give rise to property also limit property rights, is telling. He criticises existing property theories insofar as they explain and justify the existence of the institution of private property, but fail to

⁹⁶ As mentioned at the outset of this chapter and section, Gerhart is not a progressive property scholar, but his work provides an interesting example of systemic thinking within the property context, in a way that seems more in line with progressive property theory than information theory and is therefore discussed as an alternative theoretical perspective. In a sense his work offers a median between information theory and progressive property theory, insofar as his theory makes use of law and economics principles (much like the information theorists), but he does not consider the process of maximising individual welfare to be value-free or self-defining. See Gerhart PM *Property law and social morality* (2014) 6, 311-316.

⁹⁷ Gerhart PM *Property law and social morality* (2014) 7, 13-17 identifies four dichotomies in property law, namely the dichotomy between essentialist and bundle-of-sticks approaches, between rights-based theories and assent-based theories, between values as inputs and values as outputs and, finally, between individual interests and social interests. Gerhart posits that his complete theory offers a unified theory of property that can address (or mediate between) all four dichotomies.

⁹⁸ Gerhart PM *Property law and social morality* (2014) 4.

adequately explain the existence of limitations placed on property rights in the same terms used to justify the rights in the first place.⁹⁹

Gerhart's unified theory provides a way of thinking about the values that underlie property law so that disputes are about how to best implement "a unified methodology" rather than attempting to balance values.¹⁰⁰ This idea is interesting insofar as the problem with a "balancing methodology" is that one has to start somewhere, and it has a significant influence on the outcome whether one starts with the rights of the owners or with the rights of non-owners or the community.¹⁰¹ Gerhart explains that when one starts with the rights of the owner, limitations are usually regarded as exceptions to those rights.¹⁰² The balancing methodology is problematic when it always starts with an absolutist approach to property, and offers little or no appropriate means to challenge the point of departure.

Values play a significant role in Gerhart's unified theory, as he regards property as the "expression of social values", and argues strongly that what is important is not values as outputs (the value of property as a measurement device) but rather values as inputs. In terms of the latter view, the values that should be promoted by the property system is not the value we get out of a resource but rather the values that we want individuals to consider when making decisions about property.¹⁰³

⁹⁹ Gerhart PM *Property law and social morality* (2014) 5-6 argues that it is necessary to reconsider the relationship between property and values (as well as between property and limitations) in order to develop property theory that can respond to the dichotomies in property law.

¹⁰⁰ Gerhart PM *Property law and social morality* (2014) 5, 83-92.

¹⁰¹ Gerhart PM *Property law and social morality* (2014) 11. This links up with the notion of the so-called presumptive power of property. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 525; Singer JW *Entitlement: The paradoxes of property* (2000) 3.

¹⁰² Gerhart PM *Property law and social morality* (2014) 11.

¹⁰³ Gerhart PM *Property law and social morality* (2014) 7-8 argues that when value is a measure of output, it refers to what people get out of something. However, when property is not conceptualised primarily as an embodiment of economic freedom, "value as output" cannot represent the whole picture.

Gerhart argues that a system of law reflects the values of society.¹⁰⁴ South African law must be developed to reflect the values of society as embodied in the Constitution. The adoption of at least elements of Gerhart's theory seems viable in South African law, especially because a shared set of values (as the basis for Gerhart's theory) is embodied in the Constitution. The challenge for South African law lies not in the development of shared values, but in the fundamental paradigm shift it would require to see reform not as an attempt to impose the value system of the Constitution on existing law, but to imagine that property law is built on the foundation of the identified shared values and that individual entitlements can exist only to the extent which the foundation allows.¹⁰⁵

The three theoretical perspectives offered by Singer, Van der Walt and Gerhart differ in many ways, but also have some important aspects in common. Mainly, the emphasis on viewing limitations as part of the system, instead of something external to the system is telling, as well as the importance that values play in their work. Although not examples of classic systems theory, all three scholars make use of systemic elements and considerations to further their arguments, and illustrate the use of systemic thinking for purposes of developing law.

The single-system-of-law-principle requires not only unity, but systemic development. The systemic features in the abovementioned property theories indicate that a systemic constitutional approach to the regulation of property is not only possible, but preferable. A systemic constitutional approach opens up space to develop the role of property and regulation in the larger constitutional context. The Constitution creates a framework in which

¹⁰⁴ Gerhart PM *Property law and social morality* (2014) 73-83.

¹⁰⁵ This is arguably the most explicit systemic element of Gerhart's work, and this aspect closely resembles Singer and Van der Walt's suggestions regarding the role and purpose of property in law and in society.

law must operate, and this means that it is necessary for a viable theoretical approach to be able to respond to overlaps in the system.

5 4 Conclusion

Systemic thinking is useful in reconceptualising the approach to the regulation of property and provides new and innovative opportunities to develop a regulatory system that is in line with the Constitution. However, systemic thinking in itself is not enough, as is evidenced by the systemic thinking of the progressive property scholars as opposed to that of the information theorists.

The alternative or progressive theories are concerned with the social relationships that property achieves, which makes them more open to change. The information theorists' strong preference for certainty and stability leads to them accepting a lesser degree of change, as well as a strong preference for regulatory interference by the legislature instead of the courts. In progressive theory, many important developments can be effected through judicial action as well as legislation, which suggests that progressive theorists are foresee the possibility that reform can be achieved in various ways, and not only in terms of legislation.¹⁰⁶

The study, analysis and coherent development of systems are not achieved by taking a granular approach in the hope of discovering the system's governing meta-principles. Systems arguably do have governing meta-principles, but reductionism is not the way to identify or develop these principles.¹⁰⁷ One simply cannot deny that there is no "theory of

¹⁰⁶ Baron J "The contested commitments of property" (2010) 61 *Hastings Law Journal* 917-968 945. See *State v Shack* 58 NJ 297 (1971) as an example of judicial action and the Fair Housing Act 42 USC (2006) as an example of legislative reform.

¹⁰⁷ Ruhl JB "Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state" (1996) 45 *Duke Law Journal* 849-928 893.

everything” or “master key” to resolve issues of complexity.¹⁰⁸ Insofar as it is possible to read Singer, Van der Walt and Gerhart as attempts to discern the meta-principles of a sustainable property system through synthesis instead of analysis, and by acknowledging the complexities and uncertainties introduced by the interdependency between property and social control, their work creates the theoretical basis for developing property law in a systemic manner, as part of a constitutional legal system.

The systemic constitutional approach is not a meta-narrative of the principles of the regulation of the use of property; it proposes a methodology of addressing problems arising from the overlap between fields of law in relation to the regulation of property. One of the main advantages of adopting a systemic constitutional approach is that it acknowledges the interaction between the regulation of property (as a sub-system of the property law system, which in turn is a component of the constitutional legal system) and other components of the legal system. Instead of avoiding or denying complexity, it creates the space to engage with and address complexity. It allows for a consistent yet contextual way of addressing regulation disputes.

¹⁰⁸ Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) ix; Ruhl JB “Complexity theory as paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state” (1996) 45 *Duke Law Journal* 849-928 893. Even Gerhart’s so-called unified theory emphasises the complexity of the social and political system which shape the limits and content of property rights, and attempts to account for complexity in his model of decision making by property owners. See Gerhart PM *Property law and social morality* (2014) 73-83, 109-128, 247-256.

Chapter 6

Conclusion

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6 1 Introduction

“If something is really complex, it cannot be adequately described by means of a simple theory.”¹

In June 2015, the Constitutional Court handed down an important judgment for constitutional property law in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others*.² The court delivered three separate judgments, which differ on several fundamentally important issues.³ One central aspect was whether the issue before the Court (a legislative regime change involving liquor licences) ought to be addressed within the framework of section 25(1) of the Constitution, hence as a deprivation-of-property enquiry. In two of the three judgments, Froneman J and Madlanga J agreed that liquor licences do constitute property and that the issue should therefore fall within the ambit of section 25(1). Moseneke DCJ held that liquor licences should not be recognised as property for constitutional purposes, arguing that there were other options available in the constitutional framework to control instances of excessive or arbitrary regulation of such an interest. He referred to the notion of administrative justice and the provisions of administrative law as one possible option, but ultimately held that the statute should have been challenged on the basis of rationality (based on the principle of

¹ Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) ix.

² [2015] ZACC 23 (30 June 2015).

³ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015). The judgment written by Froneman J constitutes the main judgment. Moseneke DCJ wrote a separate concurring judgment, where he agrees with the final order but not with the route taken to reach the outcome. Madlanga J wrote a (partially) dissenting judgment where he agrees with the majority that the interest in question ought to be recognised as property and that the regulatory regime change brought about a deprivation of property, but unlike the majority, Madlanga J held that the deprivation was arbitrary.

legality). The substantive protection would have been the same as that offered by the main judgment, albeit without engaging with and deciding whether the interest in question was property.⁴

The question of whether administrative law had any role to play in the *Shoprite* matter illustrates the point that there is a complex relationship between sections 25 and 33 of the Constitution. Froneman J dismissed the possibility of resolving the dispute based on the provisions of PAJA, and held that “what is challenged is a legislative change to the regulatory framework for the sale of liquor, not its administrative enforcement”.⁵ But Moseneke DCJ’s judgment seems to suggest that administrative justice principles may have a wider application, and can influence the outcome of whether or not a commercial interest such as a liquor licence ought to be regarded as “property” for purposes of section 25. Moreover, criticism of the *APD* case shows that it might not be easy to determine whether a matter can be (or, more importantly, should be) resolved on the basis of PAJA instead of section 25(1), depending on what it is that litigants wish to challenge.⁶

To my mind, the *Shoprite* case raises several important issues, and the Court’s engagement with issues that are often skipped over (presumably because of the so-called arbitrariness vortex) are enlightening.⁷ It shows that South African law is still very much in the process of developing a property law system with constitutionally desirable characteristics. It shows that the relationship between the property clause and other constitutional rights and provisions has

⁴ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 128-129.

⁵ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 30.

⁶ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC). See the discussion in Chapters 1.1 and 4.4.

⁷ Roux T “Property” in Woolman S, Roux T and Bishop M (eds) *Constitutional law of South Africa* vol 3 (2nd ed OS 2003) 46 2-5, 9-11, 23-25.

not yet been fully worked out, and that more work needs to be done to determine when an issue should be dealt with in terms of section 25(1) directly. It raises questions regarding what a constitutional conception of property looks like, and what the implications for effective state regulation of the use of property are. None of these are simple questions with simple answers, as the different approaches in the *Shoprite* judgment show. This dissertation engages with some of these questions and suggests an approach to engage with some of the issues that arise from the regulation of the use of property. I reconsider the relationship between property and regulation in the constitutional context and argue that instead of eroding or undermining private property, regulation is a systemic device that can be used to minimise unwanted systemic effects and assist with the promotion of the transformative objectives of the Constitution, namely to promote constitutional non-property rights and interests.⁸

Chapter 1 sets out the research questions that this dissertation addresses. Firstly, I wanted to determine which approach to the regulation of the use of property is subscribed to in private law doctrine. The second question that I wished to answer was whether the approach to regulatory limitation of property in the constitutional context is compatible with either one of the main theoretical approaches in private law. Thirdly, if neither of the existing theoretical approaches to the regulation of the use of property is satisfactory, the aim was to establish what an appropriate approach to the regulation of the use of property for constitutional purposes is. Finally, I set out to consider how the proposed approach responds to potential overlaps between regulatory systems. In the following section, the outcomes of these research aims are set out and evaluated.

⁸ Singer JW *Entitlement: The paradoxes of property* (2000) 142-144, 208.

6 2 Regulation of the use of property in the constitutional context

6 2 1 Overview

The Constitution, with its ethos of transformation, makes it necessary to reconsider the disconnect that exists between property and regulation in private law doctrine and mandates a single system of law, based on and informed by the Constitution. The single-system-of-law principle and constitutional supremacy makes it possible (and, in fact, necessary) to adopt a systemic view of the regulation of property, as part of the single constitutional legal system.⁹

The regulation of the use of property forms an important part of the constitutional legal system and the challenge is to align the theory of the imposition of limitations on property rights with the norms and objectives of the system in its entirety.¹⁰ Van der Walt argues that the Constitution creates a framework for a property system that it wants to promote and argues that property law ought to be developed to display certain constitutionally desirable “systemic characteristics”.¹¹

From the preceding chapters, I draw the general, overarching conclusion that both theories in private law doctrine that purport to explain the nature of limitations are reductionist in nature. They do not and cannot adequately address the myriad of issues that arise from the regulation of the use of property, because the conceptual tradition of private law doctrine fails to account for the complex systemic features of the constitutional legal system. Therefore, I propose to follow a constitutional systemic approach as a means of engaging with the complex nature of the system in which both rights and limitations (in the form of regulation) form part of the system.

⁹ Van der Walt AJ *Property and constitution* (2012) 131.

¹⁰ Consider the approach in *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C). Refer to the discussion in Chapters 1.3 and 3.4.2.

¹¹ Van der Walt AJ *Property and constitution* (2012) 26.

This means that constitutional property is not regarded as a natural, pre-social right which merely tolerates restrictions. It is more appropriately conceptualised as an entitlement that is both recognised and circumscribed by the provisions of the Constitution and therefore the regulation of property must be understood with reference to the broad constitutional matrix.¹² Consequently, disputes regarding the protection of entitlements cannot be determined or adjudicated without reference to the objectives of the system as a whole. In this view, the protection of individual entitlements is but one aspect of the system, and regulation is understood as a mechanism through which a variety of democratic values, such as liberty, dignity and participation, are promoted, whilst avoiding the unjust concentration of power, haphazard developments and uncertainty regarding the influence of the Constitution on existing property rights.¹³

In the *Waterfront* case, we see (largely unarticulated) traces of a systemic constitutional approach, insofar as the court viewed the applicant's property rights through the appropriate constitutional lens and held that, properly construed, the applicant's property rights did not include the right to exclude the respondents from its property on a permanent basis.¹⁴ Effectively, the court relied on the respondents' constitutional rights to life and freedom of movement to determine the content and limit of the applicant's property rights, keeping in mind the importance of finding an appropriate balance between the private and the public interest. The court's approach indicates that it is necessary to reconsider the way property rights and limitations are conceptualised in the constitutional context. I return to this point below.

¹² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 14. See also Van der Walt AJ *Property and constitution* (2012) 29.

¹³ Singer JW *Entitlement: The paradoxes of property* (2000) 142-144, 208.

¹⁴ *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 448.

6 2 2 Continued relevance of the inherent/external debate

The process of defining private ownership has a long history of development. In the first formal definition, Bartolus defined *dominium* as the most complete and comprehensive control (so called “*perfecte disponendi*”) that a person could have over a thing, within the limits of the law.¹⁵ Subsequent writers accepted Bartolus’ definition, mainly emphasising the “perfect control” component, as a means of establishing authority for the absoluteness of ownership. Schrage, for example, tells us that this part of Bartolus’ definition formed the basis of the “eternal myth of the unlimited, unrestricted and borderless power of the owner to do whatever he pleases”.¹⁶ However, academics have shown that when the context of the definition is considered, Bartolus merely used the term *perfecte disponendi* to differentiate between *dominium* and *possessio* and that this part of the definition has been over-emphasised by, for example, the Pandectists, to support and develop a notion of absolute ownership.¹⁷ Grotius’s formulation of *dominium plenum* implicitly viewed this form of ownership as the pre-eminent right over property.¹⁸ His work presented a subtle shift in thinking, away from the medieval notions of *dominium directum* and *dominium utile* as two forms of ownership and toward a hierarchical view of full ownership and limited real rights, a view that was extremely influential in South African private law.¹⁹

¹⁵ Bartolus on *D* 21 2 39 1 n 3. See the discussion in Chapter 2.3.2.

¹⁶ Schrage EJH “*Ius in re corporali perfecte disponendi*: Property from Bartolus to the New Dutch Civil Code of 1992” in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 35-67 44.

¹⁷ See Chapter 2.3.2 and 2.3.4.

¹⁸ Milton JRL “Ownership” in Zimmermann R & Visser D (eds) *Southern cross. Civil law and common law in South Africa* (1996) 657-699 559.

¹⁹ Feenstra R “Historische aspecten van de private eigendom als rechtsinstituut” 1976 *Rechtgeleerd Magazijn Themis* 248-275 272; Visser DP “The absoluteness of ownership: The South African common law in perspective” 1985 *Acta Juridica* 39-52 41; Van der Walt AJ “Unity and pluralism in property theory – A review

These developments are not moot historical developments for two reasons. Firstly, Bartolus' and Grotius's definitions are still accepted in South African law as a point of departure. Secondly, the imposition of limitations on property rights has to be accounted for, and private law doctrine offers two main theoretical approaches to explain the nature of limitations. The absolutist approach, mainly under the influence of German Pandectism, holds that ownership is fundamentally absolute and unregulated and that an owner has the free use of his property, although limitations can be imposed externally. The limitations do not affect the essence of the right and the right returns to its natural (unlimited) form when the limitation falls away. In terms of this approach, "property is a basically unrestricted right that can accommodate restrictions – by way of exception – when the need for a restrictive measure is justified by a clear, immediate or overriding public interest".²⁰

The alternative approach holds that ownership is inherently limited and that regulatory limitations are manifestations of these inherent limitations. The inherent versus external nature of limitations was a heavily debated topic in South African private law in the 1980s and 1990s.²¹ This debate was a result of the way in which ownership had been conceptualised in private law doctrine and this dissertation shows that neither approach is suitable in the constitutional context.²²

The absolutist approach is based on the assumption that ownership is a pre-social right, the absoluteness of which guarantees private freedom against state interference. Limitations imposed upon ownership are therefore by definition external, later in time, and in principle to be treated with the necessary circumspection. To a certain extent this assumption explains the

of property theories and debates in recent literature: Part I" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 15-42 20-22.

²⁰ Van der Walt AJ *Property in the margins* (2009) 15.

²¹ Van der Walt AJ "Introduction" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 2.

²² This point is made in Chapters 2 and 3.

general perception that the imposition of a regulatory restriction deprives the owner of an entitlement that he would otherwise have had. The notion of deprivation is then understood to imply that a previously complete right is somehow diminished through regulation.

Although the inherent-limitation approach to the regulation of the use of property is followed to some extent in the constitutional context, it does not adequately address all issues relating to the regulation of property and therefore I propose a systemic constitutional approach to the regulation of the use of property.²³ While the notion of inherently-limited property rights makes it doctrinally easier to accept the constitutional justification of regulatory limitations of property, it is still hampered by its private law, doctrinal origins, and fails to envision the facilitative role that regulation of the use of property can play in achieving constitutional objectives.

A systemic view of property and regulation makes it possible to focus on more than just the protection of individual entitlements and therefore offers an alternative approach to regulation that can address the shortcomings of the approaches in private law. Moreover, a systemic constitutional approach supports the development of a system of regulated property rights that exhibits constitutionally desirable characteristics. This creates the opportunity to explain the regulation of the use of property in a manner that promotes a balance between individual entitlements, the public interest and effective regulation in South Africa.

In the systemic constitutional approach, the question of inherent or external limitation becomes less important because one can recognise that certain limitations are inherent, but it would still have to satisfy the constitutional requirements for a valid deprivation. Moreover, the effects of the limitation would also be subject to constitutional scrutiny, irrespective of whether the limitation is inherent or external to the right. The important point is that limitations are inherent to the system, rather than inherent to the right. However, insofar as

²³ The systemic constitutional approach is developed throughout Chapters 3 and 4.

the categorisation has implications for the burden of proof, it may remain relevant to expressly consider how limitations are viewed.²⁴ Even unconscious categorisation of limitations as inherent or external could lead to (often unarticulated) presumptions regarding who the owner is, what she can do and ultimately who has the burden of justifying changes to entitlements.²⁵

The analysis in Chapter 2 showed that a new approach to the regulation of the use of property is necessary for constitutional purposes. Re-evaluating the inherent/external debate had two important consequences: firstly, it showed that property rights have always been subject to some form of limitation. Secondly, it supported the argument that the centrality of the debate in private law doctrine is based on assumptions regarding the role, nature and function of property in the traditional rights paradigm, and showed that both approaches are in effect ill-suited to respond to constitutional demands. Therefore, I concluded that even if the inherently-limited approach is accepted, its potential for enabling transformation of the ownership concept is limited, because it is firmly rooted in private law doctrine. In the next section, I briefly set out the main conclusions regarding the application of the proposed systemic constitutional approach as a response to the inadequacy of the private law approaches.

6 2 3 An alternative approach to the regulation of the use of property

As was mentioned above, the Constitution provides the framework for a “new” property system and property law ought to be developed to display certain constitutionally desirable

²⁴ See Chapter 2.2 and 2.3 for a discussion of how an absolutist approach to regulation can create a presumption in favour of the owner.

²⁵ Baron J “The contested commitments of property” (2010) 61 *Hastings Law Journal* 917-968 939.

“systemic characteristics”.²⁶ An essential part of the property system is regulation of the use of property, and constitutional control over that process of regulation. In this view, property and regulation form part of the larger constitutional legal system, and therefore limitations are not imposed externally on rights. Adoption of the systemic constitutional approach means that regulation is regarded as an intrinsic, inevitable part of the system and that state regulation is a mechanism through which constitutional goals and objectives are promoted and unwanted systemic effects are minimised.

This approach fits in with the single-system-of-law principle that was set out by the Constitutional Court in the *Pharmaceutical Manufacturers* decision.²⁷ From a systemic perspective of regulation, an owner derives his entitlements from the legal system as a whole, rather than from the common law or one single section in the Constitution that explicitly protects property, and the framework for regulation is deduced from the entire constitutional context and not only the principles of private law or section 25.

A systemic constitutional approach can respond to three problems. Firstly, it reconceptualises the relationship between property and regulation to ensure that the use of property can be legitimately and effectively regulated, while simultaneously providing mechanisms to challenge excessive or unauthorised regulatory measures. Secondly, a systemic constitutional approach acknowledges the area of overlap between the regulation of property and the right to just administrative action, and suggests a methodology for identifying and addressing the overlap. Moreover, it enables the development of a constructive mutual reliance between the provisions, especially insofar as the analysis in Chapter 4 shows that the relationship between constitutional property law and administrative

²⁶ Van der Walt AJ *Property and constitution* (2012) 23-35.

²⁷ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) para 44. See Chapter 4.2.

law extend to non-overlap cases. Thirdly, this systemic approach recognises and engages with the issues that arise from the complex nature of the property system and the constitutional legal system as a whole, which means that it is not reductionist in nature.

Despite the fact that a systemic view might appear less obviously appropriate than is the case in German constitutional law, for example, it is nevertheless possible to adopt a systemic view in the South African constitutional context, as a response to the inadequacy of the private law doctrinal approaches to regulation. The (systemic) constitutional approach to regulation of property in German law developed in response to similar inadequacies and shows that when property is protected and regulated in a manner that is in line with the value system of the broader constitutional context, it is easier to find an appropriate balance between the individual and the public interest. This allows for more consistency when dealing with regulatory disputes. Moreover, a systemic view supports the development of a single system of law, where all law fits into the constitutional system and with no unjustified parallel developments, which is of vital importance in the South African legal context as well. The *Waterfront* case is one example where the courts have responded to the mandate of reconceptualising the relationship between property and limitations in the constitutional setting. The court's approach of adjudicating the dispute with reference to how property rights affect the constitutional rights of others, to determine the limits and content of an owner's rights, is in line with a systemic constitutional approach and it shows that it is possible to strike an appropriate balance between the protection of private entitlements and the public interest.²⁸

A systemic constitutional approach differs from existing private law approaches in that the former accounts for the complexity inherent to a constitutional legal system, and does not

²⁸ *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 447-449.

exclusively rely on reductionist strategies to respond to complexity. The systemic constitutional approach does not pit property and regulation against one another, but recognises that regulation is state action that is undertaken for a public purpose, and quite often the public purpose aligns with constitutional objectives. Property and regulation exist together as interrelated and interdependent components of the property system. Adopting a systemic constitutional approach to the regulation of the use of property in response to some of the constitutional challenges that the South African legal system are facing in relation to the regulation of the use of property allows for the reconsideration of the relationship between property and regulation in the constitutional context. It allows for property and regulation to be reframed as two components in a larger system, governed by the rules and values of the entire system.²⁹ In this view, property and regulation are not at odds with one another, but function together and inter-dependently. Accordingly, to create a functional, sustainable and consistent single system of law, we cannot ignore the relational nature of complex systems.³⁰

The courts acknowledge the need to develop the property law system in accordance with the aims and objects of the Constitution. For this development to succeed as part of the larger constitutional project, it is imperative to look for solutions outside of the tradition of the conceptualism of private law doctrine. In *Shoprite*, Froneman J emphasised that South African law has not yet reached consensus on how property ought to be conceptualised in a constitutional legal system, but that the answers lie in the “framework of values and individual rights in the Constitution”.³¹ It is important to reconceptualise the relationship between property and regulation to reflect the values of the Constitution, because property is

²⁹ This point is made in Chapters 3 and 4.

³⁰ Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) 80.

³¹ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 4.

not and cannot be insulated from social control, and it must be possible to effectively regulate the use of property to respond to the aims and objectives of the Constitution.

Moseneke DCJ's approach is arguably informed by his view that the constitutional protection of an interest as "constitutional property" might have the effect of shielding the interest against (in his view) legitimate state regulation.³² However, a constitutional systemic approach to the review of regulatory measures in terms of section 25(1) is arguably nuanced enough not to inhibit effective state regulation. Recognising liquor licences as constitutional property will not necessarily have the effect of insulating the interest against limitations. Moseneke DCJ raises important concerns regarding the appropriate approach regarding the constitutional scrutiny of state action, but his suggestion to decide the matter on the basis of the principle of legality does not necessarily address these concerns either. In fact, direct reliance on a broad constitutional notion (rationality review, based on the principle of legality), which is meant to respond to *lacunae* in the constitutional legal system in cases where a more specialised framework for review exists, can obfuscate the issues. The controls in section 25(1) can be applied with enough sensitivity regarding the importance of allowing legitimate state regulation to respond to Moseneke DCJ's concerns. Side-stepping the issue by relying on definitional regulation does not support the development of a constitutional property system that is capable of striking the desired balance between individual protection and the public interest in effective state regulation.

In this dissertation, I argue that the Constitution requires an approach to the regulation of the use of property that acknowledges the complexity of the system and that can respond to the mandate of developing a single system of law. In my view, the systemic constitutional approach can respond to these challenges. The systemic constitutional approach offers a

³² *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 115.

methodology for dealing with different types of limitations, originating from different sources, which are subject to scrutiny based on different areas of law. While the systemic constitutional approach may not always offer clear-cut answers to all property regulation disputes, it will at least draw attention to possible areas of overlap, and support attempts to ensure that property disputes be addressed in a non-modular fashion. This opens up space to consider non-property interests as well as the systemic effects of property and regulation. Hopefully, increased awareness regarding areas of overlap and the consequences of parallel development will encourage greater engagement with questions regarding the applicable regulatory system and the implications of the decision. In turn, this can lead to several positive developments.³³ Firstly, increased consistency when adjudicating property regulation disputes will lead to greater legal certainty, which means that it is possible to both account for complexity and avoid “randomness” in outcomes.³⁴ Secondly, legal development will take place with reference to the role and function of both property and regulation in the constitutional legal system and this supports the creation of a property system that exhibits constitutionally desirable characteristics.

The regulatory processes that determine the exact content and limits of property rights at any given time are themselves subject to regulation in various forms. This is the principal constitutional guarantee of private property rights. This “regulation of regulation” can be based on one or more of a set of different constitutionally sanctioned sources and procedures, which in some cases overlap. *APD* is one example where legal development would arguably have benefitted from greater engagement with the area of overlap between the regulation of property and the right to just administrative action.³⁵ Regardless of whether or not section

³³ Refer to Chapter 4.6 and 4.7.

³⁴ Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) 112.

³⁵ *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 66. Refer to the discussion in Chapters 1 and 4.

25(2) of the Constitution was the appropriate framework to review the effect of the regulatory measure in question, more explicit engagement with the area of overlap would have led to a more structured judgment with clearer implications. The systemic constitutional approach requires careful engagement with areas of potential overlap to determine the role and function of fields of law in relation to one another, because as is evident from the *APD* case, the importance and extent of the overlap might not always be readily ascertainable.

The area of overlap that I engage with for purposes of this dissertation is between property and the right to just administrative action.³⁶ There is an overlap between sections 25 and 33 of the Constitution when the use of property is regulated through administrative action. The complicating factor is that the overlap is not “complete”, in the sense that not all regulatory measures assume the form of administrative action. The use of property can be regulated directly through common law or legislation, or through acts of the executive or judiciary. This means that section 33 of the Constitution (together with PAJA) will sometimes apply directly to regulatory disputes involving property, but not always. A methodology is needed to address the area of overlap and to determine which regulatory framework applies. An extension of the subsidiarity principles indicates that the provisions of PAJA should always be used to challenge administrative action that adversely affects the property rights or legitimate expectations of a person, or the rights of the public, when property is the subject matter of regulation. Direct application of section 25 should be reserved for cases of direct statutory deprivation or deprivation effected through the common law directly and without the involvement of a decision by an administrator. Where more than one regulatory framework appears to be potentially applicable, the subsidiarity principles should be used to

³⁶ The area of overlap and the relationship between the provisions are discussed in Chapter 4.

determine what the appropriate framework is, to avoid the creation of parallel systems in the constitutional legal system.³⁷

In *Shoprite*, the possibility of reviewing legislation in terms of the principle of legality was raised.³⁸ If the majority of the Constitutional Court held that the liquor licences in question did not constitute constitutional property, this would have been an appropriate basis for review. However, insofar as Moseneke DCJ's judgment is based on the assumption that property is protected too strongly in terms of section 25(1) of the Constitution, and that this is the reason for not viewing liquor licences as property, it is effectively creating a possible parallel legal system, to make commercial interests more responsive to state regulation.³⁹ The uncertain scope and application of the principle of legality makes it a measure of last resort, and Moseneke DCJ's judgment should not be read as authority for relying on the principle of legality instead of section 25(1). The principle of legality should only be relied on directly where neither PAJA nor section 25 is applicable, for example where the use of property is regulated through executive action.

The approach suggested in this dissertation proposes a methodology for identifying the applicable framework to review regulatory measures, as a check to avoid the unjust exercise of state power. It also engages with the area where property law and administrative law overlap to set out the scope of direct application of section 25 of the Constitution, and to consider when and how principles of administrative justice influence property regulation disputes. This dissertation argues that there are signs in case law that the courts acknowledge the overarching influence of certain constitutional notions, which is why administrative law

³⁷ See Chapter 4.2 and 4.7.

³⁸ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 128-129.

³⁹ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 120, 124.

principles can have an impact even in cases not involving administrative action. If the courts are consistent in their approach, it could have the positive effect of aligning the content of constitutional notions such as legality, procedural fairness, reasonableness and non-arbitrariness on a normative level. Moreover, it avoids the creation of parallel routes of development.

In non-overlap property cases (where the matter is adjudicated with reference to section 25 or the principle of legality, or both) the principles of administrative law may play a role by informing the content of similar constitutional notions, such as procedural non-arbitrariness in the context of section 25(1).⁴⁰ This interconnectedness between similar constitutional notions that serve similar constitutional purposes fits in with the single-system-of-law principle, because it means that review measures are based on and reflect the same normative commitments.

In summary, the main contribution of this dissertation with regard to the systemic constitutional approach is that it maps out the problematic aspects that arise from the regulation of the use of property in the constitutional context, with specific emphasis on the relationship between property and the right to just administrative action. By adopting a systemic constitutional approach it is possible to set out how these two areas of law function together in a constitutional legal system where both are constitutionally entrenched rights.

6 2 4 Implications of the conclusions

A systemic understanding of property and regulation is a challenge to dominant mainstream ideas regarding the fundamentally absolute freedom of owners to do as they wish with their

⁴⁰ Procedural arbitrariness and the role of administrative law principles are discussed in Chapter 3.3 and Chapter 4.6.

property. One of the main criticisms that I anticipate will most likely originate from a utilitarian perspective, insofar as the constitutional systemic approach's main objective is not simplification or efficiency. However, accepting or acknowledging complexity and allowing it to influence the approach to resolving legal problems need not lead to vagueness, randomness or inconsistency.⁴¹ In fact, the opposite is possible. The systemic constitutional approach aims to provide a methodology for engaging with issues of complexity in a clear and consistent manner that will prevent arbitrary decision making, while also avoiding reliance on reductionist strategies.

Another important question is whether the systemic constitutional approach leaves too much responsibility to the courts to determine the limits and scope of property rights. Even if it is accepted that the limits and scope of property are determined by the existing laws, it might still seem like a Herculean task entrusted to courts to interpret the effects of law on the scope and content of existing property rights, keeping in mind that courts are not democratically elected institutions. I would argue that the systemic constitutional approach can facilitate involvement of other branches of government in regulatory matters, because the legislature will know what the constitutional parameters for regulation are, while ultimately holding all acts of regulation accountable to the Constitution. It aims to balance the need for protecting individual entitlements and the need for effective state regulation in the public interest.

The centrality of section 25(1) in future legal development will depend to a large extent on how broadly or purposively other constitutional provisions are interpreted. The American example, where the narrow interpretation of the Contract Clause caused the Takings Clause to emerge as the "principal bulwark of property rights", illustrates this point.⁴² In effect, the

⁴¹ Cilliers P *Complexity and postmodernism: Understanding complex systems* (1998) 112.

⁴² Ely JW *The guardian of every other rights: A constitutional history of property rights* (2nd ed 1998) 148.

mirror image of this argument was recently endorsed by Moseneke DCJ in *Shoprite*, where he held that the notion of constitutional property need not be extended to include liquor licences, since other constitutional mechanisms existed to address arbitrary or excessive state action.⁴³ This shows that the relationship between section 25(1) and other constitutional provisions will become more and more important to determine when property as an embodiment of economic liberty is protected, and when (if at all) property is protected because of its potential to indirectly protect other rights. I argue that property for constitutional purposes has some function as a civil or political right which also protects other constitutional values, but it remains an open question whether section 25(1) (as the constitutional property law framework for regulation) can or should be relied on directly where there are other constitutional provisions available.

6 3 Final remarks

This dissertation engages with a variety of issues that arise from the regulation of the use of property and sets out to revisit a theoretical debate in private law in light of the Constitution. It shows that reconsidering the relationship between property and regulation in the constitutional context is a necessary part of the on-going process in South African law to adapt to a changed legal paradigm. However, the topic of the dissertation also brought to the fore questions of methodological importance for constitutional law. The focus therefore subtly changes from Chapter 3 onward, moving from a focus on the content of law, toward a methodological question of how certain types of legal problems ought to be addressed. The constitutional imperative creates exciting opportunities for scholars to look for solutions

⁴³ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) paras 115, 128-129.

outside of the four corners of existing legal doctrine.⁴⁴ The systemic constitutional approach to the regulation of the use of property attempts to rise to this challenge.

The *Shoprite* case shows that property and regulation remain contentious issues in the constitutional setting. This dissertation does not purport to solve or even address all the issues that arise from property regulation disputes. It merely emphasises (like the *Shoprite* case) that property carries with it the underlying or unarticulated belief that property stands outside the constitutional system, insulated from social control. This problematic conceptualisation of the relationship that exists between property and regulation has the potential to threaten “the success of our constitutional project”.⁴⁵ Reconsidering the relationship in a way that supports constitutional objectives and aligns property and its regulation with South Africa’s commitment to live as a nation of free and equal persons is part of an ongoing constitutional conversation. That conversation can only take place when we explicitly engage with questions regarding the role, function and status of property and regulation in the constitutional legal system.

⁴⁴ Van der Walt AJ *Property in the margins* (2009) 243-247.

⁴⁵ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* [2015] ZACC 23 (30 June 2015) para 34.

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